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IN THE

Supreme Court of the United States

NO. 73-1619

JAMES EUGENE PETERSON,
Petitioner,

v.

UNITED STATES,
Respondent.

BRIEF FOR PETITIONER JAMES EUGENE PETERSON

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE JUDGES OF SAID COURT:

PRIOR OPINION

The only prior opinion is *United States v. Peterson,* 5th Cir., 488 F.2d 645. (See Appendix "A").

JURISDICTION

The jury verdict in the trial court was rendered February 26, 1973, and the United States District Court for

the Northern District of Texas, Dallas Division entered its order thereon on March 16, 1973. The opinion in the United States Court of Appeals for the Fifth Circuit was decided on January 18, 1974. A rehearing in that Court was overruled without written opinion on February 19, 1974.

The statutory jurisdiction of this Petition is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Was JAMES EUGENE PETERSON given fair notice or warning of the nature of the proscribed conduct for which he now finds himself convicted?

II. Did the trial court err in refusing to give requested charges and instructions which would have clarified and fairly presented appellant's position in the case?

III. Was the evidence as a whole sufficient to support the allegation that a false representation had been made, to-wit: that the services actually rendered were done personally by Dr. Peterson as opposed to the services being rendered under the direction of Dr. Peterson?

IV. Was the evidence that JAMES EUGENE PETERSON submitted a claim form in a matter within the jurisdiction of an agency of the United States and which form contained a false statement of a material fact sufficient beyond a reasonable doubt?

V. Was the verdict unauthorized and void because the Government failed to point out any rule, regulation, law, act or section of the Medicare Act that was violated by JAMES EUGENE PETERSON?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, OR REGULATIONS INVOLVED IN THIS CASE

U. S. CONSTITUTION, FIFTH AMENDMENT

U. S. CONSTITUTION, SIXTH AMENDMENT

U. S. CONSTITUTION, FOURTEENTH AMENDMENT

TITLE 18 U. S. C. A. § 371

TITLE 18 U. S. C. A. § 1001

TITLE 28 U. S. C. A. § 1254(1)

TITLE 42 U. S. C. A. § 1395, et seq.

TITLE 42 U. S. C. A. § 301, et seq.

(See appendix "B" for the pertinent text of the above.)

STATEMENT OF THE CASE

The Petitioner, JAMES EUGENE PETERSON, was tried, along with co-defendant, Dr. Donald Peterson, before a jury in the Dallas Division of the Northern District of Texas, the Honorable Sarah T. Hughes, United States District Judge, presiding.

The verdict of the jury found JAMES EUGENE PETERSON guilty of 39 counts of unlawfully, knowingly and willfully making and causing to be made false statements of material facts in a matter within the jurisdiction of the Social Security Administration, such acts being in violation of Title 18, United States Code, Section 1001.

The Social Security Administration of the Department of Health, Education and Welfare was an agency of the United States of America, administering provisions of

the Social Security Act. Title XVIII, as amended, and more positively the Health Insurance for the Aged, of the said Social Security Act, codified as Sections 1395, et seq., of Title 42 of the United States Code, including programs authorized thereunder. These titles and sections formed the basis for federal jurisdiction in the trial court.

The verdict of the jury found JAMES EUGENE PETERSON and Dr. Donald Peterson guilty of conspiracy in violation of Title 18, United States Code, Section 371.

Imposition of sentence on Dr. Donald Peterson was suspended and he was placed on probation for five years and fined $10,000.00.

JAMES EUGENE PETERSON and Dr. Donald Peterson appealed their case to the United States Court of Appeals for the Fifth Circuit. After allowing oral argument, that Court on January 18, 1974, rendered its opinion affirming the lower court decision in part and reversing and remanding with instructions to the lower court to dismiss the conspiracy count of the Indictment against both JAMES EUGENE PETERSON and Dr. Donald Peterson.

The sequence of events which prompted the Indictment, the trial and conviction of JAMES EUGENE PETERSON and Dr. Donald Peterson began to form in 1971.

In September of 1971, it became necessary for Dr. Donald Peterson to file suit against the Secretary of Health, Education and Welfare, complaining of the action by the Secretary of Health, Education and Welfare of suspending payments due Dr. Donald Peterson under Medi-

care. (T. 50-A to 57-A.)[1] This suit was filed by Dr. Peterson only after long and unsuccessful negotiations by him to have the Secretary of Health, Education and Welfare rescind the order withholding payment of assigned benefits to Dr. Peterson, which had placed a severe strain on the doctor's financial position, as well as his medical practice. An order for a preliminary injunction in Civil Action No. 3-5158-D filed in the United States District Court for the Northern District of Texas, Dallas Division was signed and entered by the Honorable Robert Hill, United States District Judge, on the 27th day of October, 1971, enjoining the Secretary of Health, Education and Welfare from withholding payments under the Medicare Program from Dr. Donald Peterson.

It was after the injunction in the civil suit had been entered that the Government invoked criminal sanctions in apparent retaliation.

On May 4, 1972, an indictment was filed against Dr. Donald Peterson in CR-3-2743, alleging a violation of Title 18, United States Code, Section 1001. JAMES EUGENE PETERSON was *not indicted* at this stage of the proceedings. (T. 220-A to 223-A.) Then, on September 8, 1972, a true bill indictment was returned against Dr. Don-

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[1] All references to the trial proceeding, pleadings and record refer to the original appendix and exhibit volumes which counsel for James Eugene Peterson will have certified by the Clerk of the Fifth Circuit Court of Appeals and transmitted to Supreme Court pursuant to Supreme Court Rule 21. In order to avoid confusion, references to the trial proceedings will refer to the original numbering used by the Court Reporter found at the upper right hand corner of the Reporter's transcript, i.e. T-1, all pages of the appendix other than the trial proceedings have been informally renumbered in the center of each page, at the bottom. Such informal renumbering contains the letter "A" after the page number, i.e. "1-A".

ald Peterson and JAMES EUGENE PETERSON in CR-3-2877, alleging offenses under Title 18, United States Code, Sections 286 and 297. (T. 224-A.) The indictment in CR-3-3000 (the indictment which forms the basis of the decision for which this Petition of Certiorari is sought) was filed February 2, 1973, and alleges offenses against both JAMES EUGENE PETERSON and Dr. Donald Peterson under Title 18, United States Code, Section 1001, and Title 18, United States Code, Section 371. (T. 5-A to 11-A.)

Dr. Donald Peterson, a licensed Doctor of Osteopathy, engaged in the general practice of osteopathic medicine, Dallas, Texas, for more than ten years, was the physician who directed the physical therapy operations at Concord Manor and at all times directed the licensed physical therapist and four different physical therapist assistants at Concord Manor. (T. 53-A.) The patients in question had, through their own physicians, been authorized for physical therapy. (T. 42.) The physical therapy which was prescribed had to be provided, and that under JAMES EUGENE PETERSON'S and Dr. Donald Peterson's understanding of the rules and regulations surrounding the Medicare Program, Dr. Donald Peterson did in fact direct the physical therapy medical services which form the basis of the request for payments complained about by the Government. It was not disputed by the Government that the services were necessary for the treatment of the patients and that the services were prescribed by a physician under a regimen or plan for treatment on an individual patient basis. Nor were the costs for such services questioned by the Government as being unreasonable or more than charges customarily made for the services that were provided for the patients. In the Government's

opening statement, Mr. Parrett, Assistant U.S. Attorney, said that they would show the conspiracy was not that the Petersons were out to defraud the Government for money. (T. 43.)

It is undisputed that the physical therapy was properly given by a licensed and qualified physical therapist and her aides. The Government's witness testified and it was undisputed that none of the physical therapy given needed the direct supervision or personal direction of a doctor, since all of the physical therapy was very routine. There was evidence from some Government witnesses and others that Dr. Donald Peterson was involved in the physical therapy program of the patients during the period in question. It was undisputed that there existed great confusion in the early years of Medicare as to the procedure for billing for services actually rendered to patients by suppliers and physicians. It was undisputed that JAMES EUGENE PETERSON spent many hours attempting to determine how to properly operate under the new and confusing Medicare program. It was undisputed that the Government's witness, Dr. Edmund Tyska, testified per the stipulation, (T. 218-A) that the procedure followed by JAMES EUGENE PETERSON was approved by Blue Cross-Blue Shield.

In summary, JAMES EUGENE PETERSON stands convicted of thirty-nine felonies for following a procedure he checked out at a time when a new statute was being implemented nationwide and where the money received was for actual services rendered properly.

REASONS FOR GRANTING WRIT

I. A substantial question exists as to the meaning of Title 18 U.S.C., Sec. 1001 and its application to forms submitted under the Social Security Act, Sec. 301 et seq., and the Medicare Act, 42 U.S.C.A., Sec. 1395 et seq., and that same is unconstitutionally vague in that men of common intelligence must necessarily guess at said statute's meaning and differ as to its application and it therefore, violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution. Therefore, this important question of federal law should be decided by this Court.

II. That the present decision of this Court of Appeals in this case affirming the trial court's action in refusing to give a charge to the jury on an essential element of the offense charged in Title 18 U.S.C., Sec. 1001, to-wit: the issue of materiality; effectively deprived JAMES EUGENE PETERSON from a full and fair trial in that the Court in instructing that the issue of materiality was a matter for the Court to decide and that the statement charged in the Indictment was in fact a material statement did not fully or accurately inform the jury as to the elements of the offense charged in the Indictment. The United States Court of Appeals for the Fifth Circuit in affirming such action of the trial court decided a federal question in a way in conflict with applicable decisions of this Court.

III. That even when viewed in the light most favorable to the Government there is not sufficient evidence and certainly not substantial evidence to support the jury verdict which found JAMES EUGENE PETERSON guilty of Counts 1 through 39 of willfully and knowingly

making false statements of material facts in any matter within the jurisdiction of any department or agency of the United States.

IV. That the present decision of the Court of Appeals in affirming the decision of the trial court as to Counts 1 through 39 was in error for the reason that the Government failed to prove beyond a reasonable doubt that any false claim or statement was made with respect to any claim form which was the basis for any of the Counts 1 through 39.

V. The government failed to point out any rule, regulation, law, act or section of the Medicare Act that was violated by JAMES EUGENE PETERSON either before or during his trial and therefore, the Government to this day has not informed JAMES EUGENE PETERSON of what rule, regulation, law, act or section of the Medicare Act he is charged with violating. Thus, in affirming the decision of the trial court the United States Court of Appeals for the Fifth Circuit has sanctioned such a far departure from the accepted and usual course of judicial proceedings by the trial court as to call for an exercise of this Court's power of supervision.

ARGUMENT

I.

JAMES EUGENE PETERSON contends that the verdict is unauthorized and is void because Title 18 U.S.C., Section 1001 is unconstitutionally vague in that it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at said statute's meaning and differ as to its application and

it therefore, violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution.

The Government's case centered around Box No. 14 on Form SSA-1490D(2). (A copy of such form has been made a part of this petition by incorporating a copy of Defendants' Exhibit 12, which is found on the following page. Additional copies of such form are found in Exhibit Vol. 1A at pages 1-E through 471-E.) [2] Various interpretations of the meaning and effect of a signature in Box No. 14 were discussed at great length during the trial but the Government never made clear whether these interpretations were recently formed or in existence at the time of the alleged offenses. If any such interpretation were written and in existence at the time in question, then this fact has never been made known to JAMES EUGENE PETERSON or to the trial court. Because of this, counsel filed a motion to suppress any testimony involving interpretations of regulations and statutes and requested that the court instruct the Assistant United States Attorney to advise his witnesses not to testify, directly or indirectly as to any interpretations of regulations and statutes. (T. 91-A.) Such Motion to Suppress was overruled by the trial court. (T. 312-A.)

The heart of JAMES EUGENE PETERSON'S defense was that at all times he was acting in good faith and never intended to do anything that the law forbade.

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[2] The Exhibits designated for inclusion in the appendix were reproduced and are contained in two separate volumes under the general heading of "Exhibits—Volume 1 and 1-A". The pages of such Exhibit volumes have been informally numbered in sequence containing the letter "E" after the page number, i.e., "1-E". Petitioner will have such volumes certified by the Clerk and transmitted to the Supreme Court pursuant to Supreme Court Rule 21.

10-A

REQUEST FOR MEDICARE PAYMENT

MEDICAL INSURANCE BENEFITS—SOCIAL SECURITY ACT

(See instructions on Back—Type or Print Information)

Form Approved Budget Bureau No 72-R0730

PART I—PATIENT'S REQUEST FOR PAYMENT

A

Group Medical and Surgical Service 00900
P.O. Box 22147
Dallas, Texas 75222

Copy from your HEALTH INSURANCE CARD (See example on back)

Name of patient: Brown Lela A.

Health insurance claim number: 429-44-9617-T

☐ Male ☒ Female

3 Patient's street address: 1317 Carpenter Freeway West

City, State, ZIP code: Irving, Texas 75060

Telephone Number: RL 5-4135

4 Describe the illness or injury for which you received treatment (Always fill in this item if your doctor does not complete Part II below)

Hypertension and obesity, Arthritis

Was your illness or injury connected with your employment? ☐ Yes ☒ No

5 If you have other health insurance or if your State medical assistance agency will pay part of your medical expenses and you want information about this claim released to the insurance company or State agency upon its request, give the following information.

Insuring organization or State agency name and address: Texas State Dept. of Public Welfare, Austin, Texas

Policy or Medical Assistance Number: OAA 4-830782

6 I authorize any holder of medical or other information about me to release to the Social Security Administration or its intermediaries or carriers any information needed for this or a related Medicare claim. I permit a copy of this authorization to be used in place of the original, and request payment of medical insurance benefits either to myself or to the party who accepts assignment below.

Signature of patient (See instructions on reverse where patient is unable to sign)

Date signed

SIGN HERE

PART II—PHYSICIAN OR SUPPLIER INFORMATION

7 A. Date of each service	B. Place of service (*See Codes below)	C. Code surgical or medical procedures and other services or supplies furnished for each date given	Code	D. Nature of illness or injury requiring services or supplies	E. Charges (If related to unusual circumstances explain in 7C)	Leave Blank
3-1-68 thro 3-31-68	NH	Gait Training 13 treatments @10.80	9444		$ 140.40	

8 Name and address of physician or supplier (Number and street, city, State, ZIP code)

Donald M. Peterson D O
Box 5209
Irving, Texas 75060

Telephone No. TA3-2821

Physician or supplier code 9890

9 Total charges $ 140.40

10 Amount paid $ -0-

11 Any unpaid balance due $ 140.40

12 Assignment of patient's bill

☒ I accept assignment ☐ I do not accept assignment

13 Show name and address of facility where services were performed (If other than home or office visits)

Concord Manor, Inc
1317 Carpenter Freeway West
Irving, Texas 75060

14 Signature of physician or supplier (A physician's signature certifies that physician's services were personally rendered by him or under his personal direction)

☐ MD ☒ DO ☐ DOS

Other degree

Date signed

*O—Doctor's Office
IL—Independent Laboratory
H—Patient's Home (If portable X-ray services, identify the supplier)
IH—Inpatient Hospital
ECF—Extended Care Facility
OH—Outpatient Hospital
OL—Other Locations
NH—Nursing Home

FORM SSA-1490D(2) (4-68)

Defs. Ex. 12

S22-E

Department of Health, Education, and Welfare
Social Security Administration

In fact, the testimony will show that on several occasions JAMES EUGENE PETERSON enlisted advice from seemingly competent professionals in a relatively new field (The Medicare Services Program) in an effort to fully comply with the law. JAMES EUGENE PETERSON did not act with a conscious purpose to avoid learning the truth nor did he act with a reckless disregard of whether the claim forms in question were submitted properly. Instead, JAMES EUGENE PETERSON made a good faith effort to submit the forms properly and acted upon the expert advice then available. Any actions now contended by the Government to be false or fraudulent were the result of a mistake or accident or other innocent reason and not done knowingly, willfully or intentionally.

Criminal sanctions should not be lightly imposed upon citizens of the United States and the violation of any statute seeking to make any act or failure to act criminal conduct must be narrowly construed. See *United States v. Laub,* 1967, 385 U.S. 475, 87 S. Ct. 574.

It is clear that 18 U.S.C., Section 1001; and Social Security Act Section 301 et seq., and the Medicare Act, 42 U.S.C.A., Sec. 1395 et seq., as they were applied to JAMES EUGENE PETERSON were impermissibly vague and failed to meet the requirements of the due process clause of the Fifth and Fourteenth Amendments. JAMES EUGENE PETERSON did not know that his conduct was forbidden by any statute or regulation and this was so even after he had made efforts to learn the proper procedures for submitting claims in an admittedly new and

confusing Government sponsored program, Medicare. [3] The classic due process test is whether the statute either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See *Connally v. General Construction Company,* 1926, 269 U.S. 385, 391, 46 S. Ct. 126, 70 Law. Ed. 322, 328; *and Lanzetta v. New Jersey,* 1939, 306 U.S. 451, 453, 59 S. Ct. 618, 83 Law. Ed. 888, 890.

A law fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not prohibited in each particular case. See *Giaccio v. Pennsylvania,* 1966, 382, U.S. 399, 402-403, 86 S. Ct. 518, 520-521, 15 Law. Ed. 2d 447, 450 and *Coates v. Cincinnati,* 402 U.S. 611, 91 S. Ct. 1686, 29 Law. Ed. 2d 214. See also *Wright v. City of Montgomery,* 406 Fed. 2d 867, 872 (5th Cir. 1969).

The record clearly establishes that the confusion that existed at the time the Medicare Program was begun, coupled with the then undefined standards of supervision made the statutes as applied to JAMES EUGENE PETERSON so vague and ambiguous that they cannot now support his conviction. The Government's conduct in this case constitutes an active misleading as to how these undefined and often inexplicably contradictory standards would be applied. The Government should not be permitted to impose criminal sanctions on JAMES EUGENE

[3] Reference is made here to Question five (5) wherein Petitioner complains of the fact that no rule, regulation, act, law, statute, or section of any act was ever furnished to Petitioner or shown to have been violated by Petitioner as applied by the Government.

PETERSON by applying these statutes in such a vague and ambiguous fashion.

> "Crimes are not to be created by inference. They may not be constructed *nunc pro tunc.* Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *United States v. Laub,* (1967) 385 U.S. 475, 487, 87 S. Ct. 574, 581.

To avoid the constitutional vice of vagueness it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. See *Rabe v. Washington,* (1972) 405 U.S. 313, 92 S. Ct. 993, 31 Law. Ed. 2d 258. A fair reading of Box No. 14 under the confusion and circumstances as they existed at the time in question would support JAMES EUGENE PETERSON'S defense of good faith in his belief that Dr. Donald Peterson as medical director of Zodiac had supervision of the physical therapy program and patients. A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct. See *Rowan v. United States Post Office Department,* (1970) 397 U.S. 728, 90 S. Ct. 1484, 25 Law. Ed. 2d 736. This was certainly the case in JAMES EUGENE PETERSON'S situation and his conviction should not be allowed to stand.

II.

JAMES EUGENE PETERSON contends that the District Court erred in refusing the give a charge to the jury on an essential element of the offense charged in Title 18 U.S.C., Sec. 1001, to-wit: the issue of materiality. The trial court in its charge took the issue of "materiality" from the jury and instructed that the statement charged

in the indictment was material as a matter of law. (T. 127-A through 128-A.) The Government in its reply brief in the 5th Circuit Court of Appeals points out that the trial court's instruction was taken verbatim from Sec. 33.09, Federal Jury Practice and Instructions, Devitt and Blackmar. Such authority does not immunize from attack in all circumstances as counsel for Government seems to think. It is not questioned that the "materiality" of the falsification is an essential element of the offense defined in 18 U.S.C., Sec. 1001. *Brandow v. United States,* 268 Fed. 2d, 559 (9th Cir. 1959); *Paritem Singh Poonian v. United States,* 294 Fed. 2d 74 (9th Cir. 1961). See also *Gonzales v. United States,* 286 Fed. 2d 118 (10th Cir. 1960). Since materiality is an essential element of the crime of making a false statement, in order to obtain a conviction under 18 U.S.C., Sec. 1001, the Government must prove that the false statement was "material" as that term has been defined in the case law. See *United States v. East,* 416 Fed. 2d, 351 (9th Cir. 1969). The court in instructing that the issue of materiality was a matter for the court to decide and that the statement charged in the indictment was in fact a material statement did not fully or accurately inform the jury as to the elements of the offense charged in the indictment. Further, the circumstances of this case clearly show that the "materiality" of Box No. 14 was not established as a matter of law and therefore, was a proper matter for submission to the jury as a question of fact. [4] Since the law and the procedures surround-

[4] The jury should have decided whether or not the physical therapy was personally rendered by Dr. Peterson or whether or not the physical therapy was under his personal direction. Then the jury should have decided whether or not a statement to this effect was "material" as applied to the facts in James Peterson's case.

ing the submission of the Medicare forms at the time in question was admittedly in a state of confusion then it can be readily seen that the jury could have reasonably concluded that JAMES EUGENE PETERSON had not knowingly submitted a false statement of a material nature.

The Government argues that there is no merit to JAMES EUGENE PETERSON'S effort to utilize the omission of signatures from Item No. 14 on certain exhibits to show that the signed statement of Dr. Donald Peterson was not "material." Further the Government contends that the particular exhibits to which JAMES EUGENE PETERSON refers were not claims which were the basis for charges involved in Counts 1 through 39 of the indictment. This argument is simply not true. JAMES EUGENE PETERSON would direct the Court's attention to the following exhibits and counts in the indictments:

Count 3 of the indictment, claim $140.40, patient's name Lela A. Brown, (a copy of the claim form in question is reproduced and included on page 10A of this brief) also see Exhibit Vol. No. 1A, page 522-E for the unsigned request for Medicare payment; Count 11, claim of $140.40, patient Rowena Tucker, Exhibit Vol. No. 1A, page 527-E; Count 22, claim $280.80, patient's name Freida M. Willis, Exhibit Vol. No. 1A, page 524-E; Count 28, claim of $140.40, patient William F. Russell, Exhibit Vol. No. 1A, page 530-E; Count 38, claim of $140.40, patient Eva W. Moore, Exhibit Vol. No. 1A, page 537-E.

These five counts of the indictment had no signature of any kind or writing of any character in Box No. 14. Yet, these unsigned claims were paid just as readily as were the signed claims. The test of materiality is

whether or not the answer has the natural tendency to influence or was capable of influencing the decision of the officer or agent to whom it was submitted. See *Poulos v. The United States*, 387 Fed. 2d 4 (10th Cir. 1968); *United States v. East*, 416 Fed. 2d 351 (9th Cir. 1969); *Tzantarmas v. United States*, 402 Fed. 2d 163 (9th Cir. 1968). Since it was admitted by the Government and the Government's witnesses that all the other information on Form SSA 1490D(2) was correct and not in issue in this proceeding, then, how it can seriously be contended that the signing in Box No. 14 was a material statement as a matter of law when a "nonstatement" received the same treatment, was processed exactly as were all the other forms and was paid without delay or even a question.

JAMES EUGENE PETERSON would urge that the lack of a signature or "nonstatement" would indicate that such statement or Box No. 14 was "not material" as a matter of law. However, at the very least a valid fact issue as to materiality was raised for the jury's determination.

JAMES EUGENE PETERSON was entitled to no less than a fair submission of the essential elements and issues in this case and while the issue of materiality may have very well been decided against him by the jury, they should have at least been afforded the opportunity to rule on the issue. But, in the case at bar, the jury was not allowed to consider the issue of "materiality" and was instructed not to decide such issue. Since materiality is an essential element of the offense, the conviction of JAMES EUGENE PETERSON on all of the substantive counts should not be allowed to stand for failure to instruct the jury properly.

It was the Government's position that when a physician signed Box No. 14 on the form referred to above, that the services described on such form had actually been performed personally by such physician as opposed to the services being rendered "under the direction of Dr. Peterson". It was James Peterson's theory of the case that the doctor did not have to be physically present when the physical therapy services in question were rendered, but rather had to exercise direction and supervision in the providing of these services which would not have required him to be "physically present". In attempting to have this issue resolved by the jury, defendant James Peterson requested the following charge:

> The issue of the materiality of the alleged false statement is a question for the jury to resolve.
>
> You are instructed that the indictment alleges that material statement that is false in the "Request for Payments—Medical Insurance Benefit" is that the treatment was not done under the personal direction of Dr. Donald M. Peterson.
>
> Before you can consider and determine the other essential elements of the offense as set out herein, you must first find and believe beyond a reasonable doubt that such treatments were not done under the personal direction of Dr. Donald Peterson.
>
> However, if you find that such treatments listed in the "Request for Payments—Medical Insurance Benefits" were done under the personal direction of Dr. Donald Peterson, or if you have a reasonable doubt that they were so rendered, then you will find both defendants not guilty.

Such instruction was refused by the trial court. (T. 117-A.).

The evidence fairly raised defendant's theory of the case and the Petersons were certainly entitled to have

their theory included in the jury charge. See *Pierce v. United States*, 414 F.2d 163 (5 Cir.) cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969).

(A) There is no question in the evidence that the physical therapy services were rendered to eligible patients. There is no question in the evidence that such physical therapy services were needed by these qualified patients and that the costs of such services were reasonable. There was an issue as to whether or not the physical therapy services rendered were rendered "under the personal direction of Dr. Donald Peterson". This the jury should have decided under proper instructions and with proper explanatory definitions and JAMES EUGENE PETERSON was entitled to have the jury consider his theory of the defense which had foundation in the evidence. See *United States v. Grimes*, 413 F. 2d 1376, (7th Cir. 1969).

Likewise, James Peterson requested the following charge:

> You are further instructed that if the physical treatments shown on the "Request for Payments—Medical Insurance Benefits" were rendered under the personal direction of Dr. Donald Peterson, then you will find the defendants not guilty. (T. 110-A.)

Such requested instruction was a short concise statement affirmatively submitting to the jury that they should determine whether or not the services in question were rendered under the personal direction of Dr. Donald Peterson. This was the central issue in the case and should not have been refused by the trial court. The failure to give complete instructions on that question, espe-

cially in light of James Peterson's request, was prejudicial error. See *Moore v. United States,* 356 F.2d 39, (5th Cir. 1966).

The existence of the confusion surrounding the implementation of the Medicare Program which was evident from Intermediary Letter No. 375 (T. 233-A through 236-A), as well as the testimony of Bill West, the Government's witness, made explanatory instruction all the more crucial to the fair presentation of JAMES PETERSON'S defense.

The proper standard or test to be applied regarding whether or not a defense issue should be submitted to a jury is "whether there is some evidence to support the defense theory". See *United States v. Garcia,* 452 F.2d 419, (5th Cir. 1971). There is no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. In effect, the trial judge in James Peterson's case, took the issue of good faith away from the jury in refusing James Peterson's requested instructions.

(B) The issue of good faith was again requested by James Peterson in the following instruction which was refused by the Court:

> You are instructed to find the defendants not guilty if the physical therapy was performed and Dr. Peterson believed he was entitled to bill for same under the rules then enforced as of the time the work was performed. (T. 105-A.)

James Peterson consistently urged the valid defense of good faith in that he had done nothing wrong under the law and that there was no showing by the Government that any law, rule, or regulation had been violated. In the

furtherance of such defense, counsel submitted a properly framed and valid defensive issue which the Court refused. It is elementary law that the defendant in a criminal case is entitled to have presented instructions leading to a theory of defense for which there is any foundation in the evidence. See *Perez v. United States,* 297 F.2d 12, (5th Cir. 1961).

This Court, in *United States v. Galbreath,* 452 F.2d 992, 994, (5th Cir. 1971), set out the primary purpose of jury instructions in the following language:

> The primary purpose of jury instruction is to define with substantial particularity the factual issues, and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them. *United v. Hill,* 417 F.2d 279 (5 Cir., 1969). Accordingly, a defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense. *Perez v. United States,* 297 F.2d 12 (5 Cir., 1961). . . . .the failure to give complete instructions on the [authority] question, especially in light of the defendant's request, was reversible error. *United States v. Galbert,* 140 U.S. App. D.C. 66, 433 F.2d 1172 (1970); *C. F. Moore v. United States,* 356 F.2d 39 (5 Cir., 1966).

In an effort to narrow the issue of the false statements, counsel for James Peterson in his cross-examination of Bill West, the Government's witness from Blue Cross-Blue Shield, asked the following questions regarding the truthfulness of the other statements contained on the form in issue and offered the following answers:

> Q: Let me ask you about part one of such claim form. I'm talking now about the SSA 1490D, is that correct? Is that the forms that you have before you?
>
> A. Yes.

Q: And as to part one of those particular forms that you have gone through, is everything in there, as far as you know, correct?

A: Yes. (T. 76)

Q: Well, Mr. West, what I asked you was in reference to Box 7. Do you know where Box 7 is there? And what it covers?

A: Yes.

Q: In reference to Box 7, is it your company's position that the services were reasonable, and that the charge therefor was reasonable as set out in each of the forms before you in Box 7?

A: The charge for these services are reasonable.

A: All right. Then as I understand where we are at this point, Mr. West, on that form through Box 7 there is nothing that is false or fraudulent or misrepresentation as far as you know, on any of those claim forms before you in Government's Exhibit 1 through 120 that are requests for payment. Is that correct?

(To which question Government counsel objected as calling for a legal conclusion and was sustained by the Court.) (T. 80-81.)

Q: Other than your interpretation of Box 14, is there anything that you found in connection with those requests for medical payments that are not correct?

A: At what point in time did I discover this?

Q: At the time it was submitted?

A: Well, I noticed that Item 8 is not proper. We have one address in our computer, another address x'd out on this particular form.

Q: All right. That would not effect whether or not it was paid or not paid, though, would it?

A: No, sir.

Q: All right. Your answer is no, sir, you do not find anything in anything except your interpretation of 14 that is not correct?

A: That's correct. (T-90-91.)

JAMES EUGENE PETERSON was entitled to a fair submission of all the essential elements, defenses and explanatory definitions that would aid the jury in reaching their verdict. This JAMES EUGENE PETERSON did not receive and thus his conviction should not be permitted to stand.

III.

JAMES EUGENE PETERSON, contends that there was insufficient evidence to support the jury's findings that he made willful misrepresentations on the claims forms filed with group medical and surgical service. Under the established judicial precedent, a jury verdict must be sustained if there is substantial evidence when viewed in a light most propitious to the Government, to support it. See *Glasser vs. United States*, 315 U.S. 60, 80, 62 Sup. Ct. 457, 86 Law. Ed. 680 (1942). As the United States Court of Appeals for the Fifth Circuit stated in its opinion in this matter "this rule, while dictating that deference be extended to jury's findings, does not immunize them from attack." *United States vs. Peterson*, 488 Fed. 2d 645, 649 (Fifth Cir. 1974). JAMES EUGENE PETERSON would urge that there is insufficient evidence to show that Lucille Morton forged Dr. Peterson's signature at JAMES EUGENE PETERSON'S behest and that JAMES EUGENE PETERSON had singularly engineered the false filings of the claims in question. The evidence surrounding the instructions given by JAMES EUGENE PETERSON to Lucille Morton is not clear and certainly not unequivocable.

The United States Government undertook in Cause No. CA3-5158D in the Northern District of Texas to seek to recover civil penalties from Dr. Donald Peterson and JAMES EUGENE PETERSON for alleged violations of the False Claims Act. In that case the Government was seeking to recover penalties in excess of $240,000.00 for the submission of the same claims which are in evidence in the case at bar. Subsequent to the criminal trial and as a part of the preparation of the trial of the civil case the deposition of Lucille Morton was taken. Subsequently, at the trial on the merits she was again on the witness stand. Therefore, Mrs. Morton's testimony has been transcribed on three occasions and it varies substantially although it can be reconciled as we shall point out. For convenience, an appendix containing excerpts from Lucille Morton's deposition testimony and her testimony at the civil trial with a comparison of both and accompanying explanatory comments, is attached and made a part of Petitioner's Petition for Writ of Certiorari. (See appendix "C".)

Both the testimony from Lucille Morton's deposition as well as the transcript of the civil proceeding have been summarized as follows with references to the appropriate sections referred to in the attached "appendix C".

Lucille Morton operated independently in her work and JAMES EUGENE PETERSON did not interfere with her performance of her duties and responsibilities and he only gave her general instructions to prepare the forms in question. (Pages C-2 through C-7 of attached appendix.)

It is apparent that Lucille Morton took JAMES EUGENE PETERSON'S general instructions and extrapo-

lates it to mean that she was to forge Dr. Peterson's signature. This supports JAMES EUGENE PETERSON'S defense that he only instructed Lucille Morton in matters of general substance. It is obvious from reading the testimony in Lucille Morton's deposition that she was given a general instruction which she misinterpreted.

In further support of this theory we look to the testimony of Lucille Morton at the trial of the civil case referred to above. The questions prepondered to Lucille Morton and her answers thereto indicate that JAMES EUGENE PETERSON merely asked her to get out the forms as soon as possible. (Pages C-11—C-12 of attached appendix C.)

When Lucille Morton was asked why she put Dr. Donald Peterson's name on the forms in question, she responded that Part B can only be billed through a doctor's provider number. When pressed as to how she got that provider number, she replied that it was merely put on her desk and she did not know who brought it in. (Page C-12 of attached appendix C.)

Referring to Cathryn Short's signing of Helen Mathis' name, Lucille Morton was questioned as to who told Miss Short to sign Helen Mathis' name. Miss Morton responded that she did not know and that they were merely told to get the forms out, that there were two signatures to sign, so they decided between them that one signature was just as bad as the other to sign and they chose the one each was to sign among themselves. (Page C-13 of attached appendix C.)

Again during the civil trial Lucille Morton testified that she was merely told to get the forms out, and she

undertook to fulfill those instructions and that in doing so she had access to manuals that dealt with how to fill out similar forms and that the forms themselves were self-explanatory. (See C-13 and C-14 of attached appendix C.) A clear example of the generality of the instructions given is found on page C-14 of the attached appendix C.)

> Question: And by virtue of your experience, as the bookkeeper, then you knew where that information was, and was able to obtain it for the particular patients and put it on the forms, is that correct?
>
> Answer: Yes.
>
> Question: Now, what was part of the—or was this part of the instructions you were given?
>
> Answer: *My instructions were to get them out.*
>
> *Question: Okay. That's really what all your instructions were, is just get these forms out.*
>
> Answer: *That's right.*
>
> (Emphasis added.)

Even when viewed in the light most favorable to the Government there is not sufficient evidence and certainly not substantial evidence to support the jury verdict which found JAMES EUGENE PETERSON guilty of Counts 1 through 39 of willfully and knowingly making false statements of material facts in any manner within the jurisdiction of any department or agency of the United States. In particular there is insufficient evidence and certainly no substantial evidence that JAMES EUGENE PETERSON instructed, requested or caused Lucille Morton to forge Dr. Donald Peterson's name on the forms in question or that she did so at his behest. The evidence does show that Lucille Morton took general instructions in the matter of the forms in question and assumed them to mean that she was to forge signatures and submit the claim.

The testimony indicated that Lucille Morton signed Dr. Donald Peterson's name in Box 14. Box 14 is the only statement contended to be false by the Government.

The court charged that JAMES EUGENE PETERSON could be found guilty as a principal only if the "acts or conduct of an employee or other agent are willfully ordered or directed." (T. 128-A.)

The United States Court of Appeals' opinion on original submission said that Mrs. Lucille Morton forged Dr. Peterson's name to Box 14 at the "behest" of JAMES EUGENE PETERSON and that false filing of the form was engineered by JAMES EUGENE PETERSON. See *United States v. Peterson*, 488 Fed. 2d, 645, 650 (Fifth Cir., 1974.)

The basis of these statements are attributed exclusively to the testimony of Lucille Morton. Her testimony from the deposition in the civil case and the civil trial itself are abstracted in the appendix attached to this brief. In summary, such sworn testimony of Lucille Morton really shows only that JAMES EUGENE PETERSON gave very general instructions to get the forms out, and nothing else. Under the facts, her assumption was not a rational or logical one. Therefore, JAMES EUGENE PETERSON'S conviction on substantive Counts 1 through 39 should not be allowed to stand and this Honorable Court should issue a Writ of Certiorari in this cause.

IV.

JAMES EUGENE PETERSON contends that the Government failed to prove beyond a reasonable doubt that any false claim or statement was made with respect to

any claim form which was a basis for any of the Counts 1 through 39.

The Government has urged that under the language in Box 14, that Dr. Peterson's signature (if it had not been forged) would have certified that he had personally rendered the services which were being billed for or they had been done under his personal direction. Having established this straw man premise the Government then undertakes to prove the negative fact, i.e. he did not personally render the services nor were they done under his personal direction. The negative fact is important only if the initial premise is valid.

The indictment alleges that the medical services rendered to those persons named as the patients in Counts 1 through 39 were not personally rendered by Dr. Donald M. Peterson or under his personal direction. (T. 7-A.) The Government, therefore, had the burden to prove beyond a reasonable doubt that the medical services were not personally rendered by Dr. Donald M. Peterson and that the services were not rendered under his direction. JAMES EUGENE PETERSON would show that the evidence is insufficient to show that the services were not rendered under the direction of Dr. Donald M. Peterson.

The first Government witness was Bill West, Assistant Vice President of Group Hospital Service and Group Medical and Surgical Service. (T. 46) He testified that his company had a contract with the Secretary of Health, Education and Welfare to carry out the provisions of Section 1842 of the Social Security Act; (T. 48) that under the provisions of that contract, his company processed and paid claims under Part B of the Act; (T. 49) that Part B claims are for physicians and other health practitioners'

services only; (T. 50) that Government Exhibits 1 through 120 were copies of claims submitted by Dr. Donald M. Peterson on various patients, together with the copy of the check from his company to Dr. Peterson and the sheet showing the explanation of Medicare Benefit Form explaining the transaction; (T. 52-56) that the claim forms reflected in these Exhibits were for services performed in the first six months of 1968 (T. 63); that these forms were prepared by his company pursuant to the statutes and regulations; that the regulations were changed from time to time (T. 66); that during the first two years, which included the first six months of 1968, there were a lot of changes, both in acts by Congress, Federal Law, and the regulations issued by H.E.W. (T. 67); that his company would interpret certain regulations differently than H.E.W. from time to time (T. 68); that in reference to payments for any type of claims under Medicare for out-patient physical therapy, there were certain rules and regulations and interpretations (T. 70); that there was a change in the procedure involving extended care facilities and out-patient treatment effective July 1, 1968 (T. 72); that all of the claim forms submitted and introduced as Government Exhibits 1 through 120 contained persons who were enrolled in Part B Program (T. 78); that the amounts billed on said Government Exhibits were reasonable for the services contained on the claim form (T. 78-79); and in effect testified that everything on the forms submitted was proper and correct. In reference to a similar situation of supervision, in reference to hospitals, Mr. West said that it was permissible to have a doctor who was administering the plan and then have registered therapists and aides who were actually doing the day-in and day-out therapy with the doctor being available on an

emergency basis (T. 75). In connection with a clinic-type situation, the situation would be basically the same, as to the work being performed by registered physical therapists and trained aides under the registered physical therapist (T. 75).

It was Mr. West's position that "before a doctor could be paid under Part B for physical therapy done by a physical therapist, the doctor must be personally present."[5] He further testified that when his company paid the claim, "it was presumed that the doctor did the actual therapy" (T. 89). However, Mr. West further testified that the claims were actually paid because it was physical therapy that was either performed by Dr. Peterson or under his direction (T. 90). In regard to Government Exhibits 1 through 120, he testified that he did not find anything except his interpretation of Box 14 on the claim that was not correct (T. 91).

Mr. West, in discussing the definition of personal direction, stated that such things as x-rays are taken by x-ray technicians; that EKG's are taken by a technician; that taking of blood pressure is by a technician; the extraction of blood for analysis is taken by a technician and that the doctor is not personally present when the services are done by the technician.

Mr. West was unable to testify as to any statutory definition for personal direction, that he was aware of, passed by the United States Congress and was unable to provide any regulations defining what personal direction meant during the period of time involved, the first six months of 1968 (T. 98 and 99). He further testified that

---

5. Although the Government could not furnish any statute, law, rule or regulation to support this "heresay" interpretation and conclusion.

many of the regulations issued by H.E.W. would not be available to an interested person, such as this appellant, even upon request and such persons making inquiry would have to rely upon their interpretation. (T. 100-101)

Upon cross-examination by counsel for the co-defendant (Dr. Donald M. Peterson), Mr. West testified that he was familiar with Intermediary Letter Number 375 that went out over the signature of Thomas M. Tierney under date of April, 1969; that Mr. Tierney was the Director of the Bureau of Health Insurance at H.E.W. and counsel attempted to question Mr. West about this letter, whereupon the court sustained the Government's Attorney's objection because it was irrelevant and immaterial. Such letter is before this Honorable Court on an offer of proof. (T. 233-A)

Mr. West was requested to search his records as to any regulations defining personal direction and report back to the court; and at the conclusion of the trial, counsel for this appellant requested that such regulation be given that had previously been turned over to the Government's Attorney by Mr. West and the only document given was one that post-dated the period in question, the first six months of 1968; and that no such regulation was in existence.

Dr. Edmund R. Tyska was called by the Government and he testified that he had patients in Concord; and he further testified that he had conversations with Dr. Peterson concerning physical therapy (T. 327); that he knew that Dr. Peterson was the medical director of Zodiac (T. 327); that Mrs. Maeker, the physical therapist, told him that Dr. Peterson had trained her and the aides (T. 328);

that he saw Dr. Peterson talk to some of his (Tyska's) patients (T. 330); that he talked with Dr. Peterson concerning physical therapy on his (Tyska's) patients (T. 331); that there was a great deal of confusion on the Medicare coverage at this time in 1968 (T. 332); that he had a conversation with someone at Blue Cross-Blue Shield at about this time (T. 333); that he saw no need for a doctor to supervise the routine physical therapy (T. 336); that JAMES EUGENE PETERSON had a good reputation for fair dealing and a good reputation for peaceful and law-abiding citizenship, and a good reputation for truth and veracity (T. 342).

The Court of Appeals in its opinion conceded that the meaning of the terminology "under his personal direction" contained in Box 14 of Form SSA 1490D(2) was ambiguous and that certain evidence excluded by the trial court tended to show the confusion that existed in this regard. *U. S. v. Peterson*, 488 Fed. 2d 645, 649 (Fifth Cir., 1974).

However, the Court of Appeals went on to say that evidence of Dr. Peterson's non-involvement in administering physical therapy clearly supports the jury's findings in this regard. This conclusion by the Court of Appeals is in direct conflict with the *above* testimony of Dr. Edmund R. Tyska concerning Dr. Peterson's involvement as medical director of Zodiac and the training by Dr. Peterson of Mrs. Maeker, a physical therapist.

As stated in *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240 (1952) this Court held that to possess the requisite intent to defraud, the individual must be aware that what he is doing is wrong. Absent any statute or

regulation defining "personal direction", the Government has totally failed to discharge the burden of proof concerning a false representation dealing therewith.

In the Fifth Circuit, the rule is as follows, as expressed in *Lambert v. United States,* 261 Fed. 2d 799, 801 (Fifth Cir. 1958);

> "On a motion for judgment of acquittal, the test is whether, taking the view most favorable to the Government, a reasonable minded jury might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt." See. also, *Mortensen v. United States,* 322 U.S. 369, 374, 64 S. Ct. 1037, 1040, 88 L. Ed. 1331 (1944).

In *Riggs v. United States,* 280 Fed. 2d 949, 954 (Fifth Cir. 1960) the Court quoted from *Curley v. United States, (D.C.),* 1947, 160 Fed. 2d 229, at 232, as follows:

> "The functions of the jury include a determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or nonexistence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration."

Only "physician's services" under the explicit language of Box 14 must have been "personally rendered" or under his "personal direction". If the services rendered were not "physician's services" then there was no requirement that they had to be "personally rendered" or done

under the certifying doctors "personal direction". If the certificate is not applicable to the facts, there is no falsity. The claims are valid if the services were in fact rendered by someone and were eligible services under Part B of the Medicare Act.

Eligible benefits under Part B are found in Title 42 U.S.C.A. 1395k. It includes "medical and other health services". This term is then defined at 1395x(s) which includes "(1) physician's services" and "(2) services. . .incident to a physician's professional service. . .". Now the term "physician's services" is defined at 1395x(q). So there is a distinction between "physician's services" and "services. . .incident". Box 14 has effect only in respect to "physician's services" and does not relate to the "services. . .incident". The services provided were "incident to" a doctor's service i.e. the doctor who ordered the therapy and, are, therefore compensable. The forms don't claim that Dr. Peterson personally did the physical therapy or that he personally gave the direct and personal orders as to each patient. His was a general overall supervision and as such he had the overall personal direction. There was no falsity in Box 14, therefore, the evidence presented by the Government attempting to establish guilt on the part of JAMES EUGENE PETERSON in Counts 1 through 39 of the indictment simply does not measure up to that high standard of "beyond a reasonable doubt" and the conviction should not be allowed to stand.

V.

JAMES EUGENE PETERSON would show this Court that the Government failed to point out any rule, regulation, law, act or section of the Medicare Act that was

violated by him. This failure to advise or inform JAMES EUGENE PETERSON of the particular acts he was supposed to have violated was true not only before and during trial but holds true to this very day. Such failure to advise JAMES EUGENE PETERSON of the nature and cause of the accusation against him violates the information respecting accusation provision of the Sixth Amendment and the due process clause of the Fifth and Fourteenth Amendments.

From the beginning, counsel for JAMES EUGENE PETERSON was frustrated in its efforts to obtain a clear statement of what JAMES EUGENE PETERSON was alleged to have done that is forbidden, and, under what authority, regulation, statute or order were such acts forbidden as material matter within the jurisdiction of a department or agency of the United States. In an effort to learn just what it was about JAMES EUGENE PETERSON'S conduct that was in violation of a statute, regulation or order, a motion for bill of particulars was filed. (T. 77-A.) Through the bill of particulars JAMES EUGENE PETERSON hoped to learn just what regulation or statute he was alleged to have violated. He also hoped to obtain any written documentation of a written interpretation by any agency or department of the United States which would clarify the charges brought by the Government and show that JAMES EUGENE PETERSON'S actions were violations of a criminal statute. However, JAMES EUGENE PETERSON was never able to obtain any such regulation, statute or written interpretation of the requirements of the document entitled, "Request for Payments—Medical Insurance Benefits", which is designated Form SSA 1490D(2). Therefore, it was never made known under what authority, act, regulation

or statute the acts alleged to be criminal in nature were in fact criminal.

Again, counsel for JAMES EUGENE PETERSON urged his various discovery motions, bill of particulars and motion to suppress before the court. (T. 310-A to 315-A.) With regard to the request for interpretations of regulations in statutes the court ruled as follows:

> *"Counsel for Appellant:* All right, I wonder if Mr. Parrett (counsel for Government) does anticipate bringing any interpretations in, if they are written interpretations that we could be furnished those written interpretations ahead of time?" *The court:* I'll ask him to do that." *"Counsel for Government'* If we have written interpretations, we will be glad to supply them." *"The court:* If there are any written interpretations, I'll ask you to give them to him." (Meaning counsel for JAMES EUGENE PETERSON.((T. 312-A to 313-A.)

Again at T. 315-A counsel for Appellant requested the regulations that were in effect as far as the Social Security and H.E.W. were concerned in early 1968.

> *By counsel for Appellant:* "I have one further request—the regulations that were in effect as far as the Social Security and H.E.W. in early 1968 are extremely hard to come by, and I am wondering if Mr. Parrett has a collection of those that are available to us or can obtain such through the agency he represents. *"Mr. Parrett:* I have none. If I can come up with some, I'll be glad to let him have them. That's all I can say."

As was previously pointed out, the Government's case rested squarely on their narrow interpretation of the Medicare program interpreting the language in Box No. 14. The Government's witness, Mr. Bill West, was asked by counsel whether or not there was a regulation effective in 1968 defining personal direction, to which Mr. West responded that there was.

Question: Mr. West, you said that you thought there was a regulation effective in 1968 defining personal direction, did you not?

Answer: Yes.

Question: Would you, while you are no longer a witness, find that and report that back to us? That regulation number, and give us a copy of it?

Answer: Do I have the prerogative to answer yes or no?

The Court: Are you asking him to bring the regulation here?

Mr. Burleson: Yes, Ma'am.

The Court: You may just send it up here and give it to Mr. Parrett, if you find it.

Mr. Parrett: If he has it, if it's available.

The Court: I say, if he has it, or if he finds it. (T. 125-126.)

Such a regulation had been diligently sought by JAMES EUGENE PETERSON'S counsel and although the court requested that the witness bring the regulation to the court and give it to Mr. Parrett if he (Mr. West) found it, no such regulation has to this day been forthcoming.

Further, at the close of the trial counsel for JAMES EUGENE PETERSON brought to the attention of the court that no regulation for the period of time in question had ever been produced.

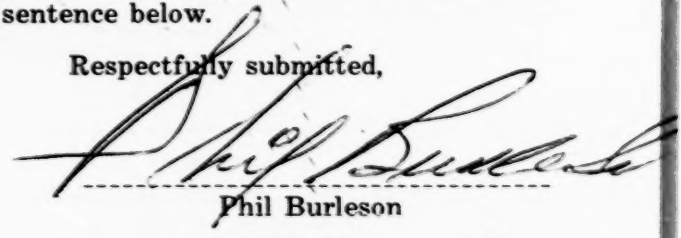
Counsel for James Peterson: "Your honor, I have asked for a regulation through Mr. West, if the court remembers, that was in effect—effective the first part of 1968. The Government has provided me with a regulation that is dated 12-8-68. I assume that they did not have one that was in effect in the early part of 1968 is that correct?" *"Mr. Parrett:* We've given you what Mr. West gave us. (T. 528.)

This lack of notice of what regulation or interpretation was alleged to have been violated coupled with the vagueness of Title 18 U.S.C. §1001 as it applied to JAMES EUGENE PETERSON did not give him fair notice that his conduct was forbidden and JAMES EUGENE PETERSON should not be held criminally responsible for conduct which he could not reasonably understand to be proscribed. *Palmer v. City of Euclid, Ohio,* 402 U.S. 544, 91 S. Ct. 1563, 29 Law. Ed. 2d 98 (1971); citing *United States v. Harris,* 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 Law. Ed. 989 (1954).

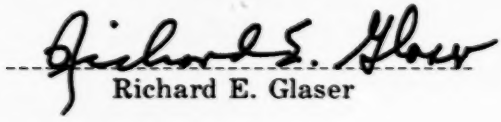
CONCLUSION

WHEREFORE, Petitioner JAMES EUGENE PETERSON prays that upon consideration of this Petition, that this Honorable Court grant a Writ of Certiorari in this case and vacate and remand or render with instructions, the verdict and sentence below.

Respectfully submitted,



Phil Burleson



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James Eugene Peterson

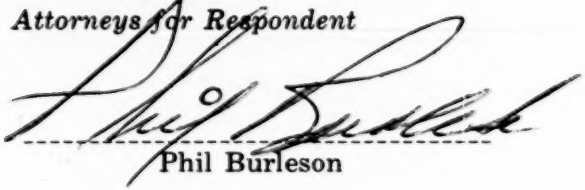
CERTIFICATE OF SERVICE

This is to certify that I have on this 26th day of April, 1974, mailed three printed copies of the foregoing Petition for Writ of Certiorari on behalf of JAMES EUGENE PETERSON to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Honorable Frank McCown,
United States Attorney
Northern District of Texas
1100 Commerce Street
U. S. Courthouse
Dallas, Texas 75202

Attorneys for Respondent



Phil Burleson

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

James Eugene PETERSON and Donald M. Peterson, Defendants-Appellants.

No. 73-1748.

United States Court of Appeals, Fifth Circuit.

Jan. 18, 1974.

Prosecution of two defendants, a physician and a non-physician, for unlawfully and knowingly making false statements of material facts to a government agency, and for conspiracy, in connection with claims for payment for physical therapy services rendered. In the United States District Court for the Northern District of Texas at Dallas, Sarah Tilghman Hughes, J., the non-physician was convicted of substantive offenses and of conspiracy, and the physician was convicted only of conspiracy. They appealed. The Court of Appeals, Gewin, Circuit Judge, held that, in view of overwhelming evidence that the doctor did not in fact supervise the rendition of physical therapy services, evidence which might have raised a doubt as to whether the physician was required to be personally present when the services were rendered, to meet a requirement of personal supervision, was properly excluded. The Court also held, however, that evidence was insufficient to sustain the conspiracy conviction of the physician, whose signature on the claim forms had been forged.

Affirmed in part; reversed and remanded with instructions to dismiss conspiracy count of indictment.

1. Fraud Key69(4)

In prosecution for falsely certifying to United States government agency that doctor had supervised rendition of physical therapy services, in view of overwhelming evidence that doctor did not in fact supervise, it was within discretion of trial court to exclude evidence which might have raised doubt as to whether physician was required to be personally present when services were rendered, to meet requirement of personal supervision. 18 U.S.C.A. § 1001; Social Security Act, § 1801 et seq., 42 U.S.C.A. § 1395 et seq.; Fed.Rules Crim. Proc. rule 26, 18 U.S.C.A.

2. Criminal Law Key1153(1)

Defendant was not entitled to reversal of conviction on ground of suppression of evidence by Government where evidence was not suppressed but merely excluded and where exclusion was within discretion of trial court. Fed.Rules Crim.Proc. rule 26, 18 U.S.C.A.

3. Criminal Law Key829(1)

Where trial judge's instructions encompassed substance of what defendant desired to have court propound to jury, defendant was not entitled to reversal for alleged failure to give requested charges and instructions.

4. Fraud Key69(5)

In prosecution for making wilful misrepresentation on claim forms for payment from United States for physical therapy services rendered, evidence of physician de-

fendant's noninvolvement in administering the physical therapy sustained conviction of nonphysician defendant. 18 U.S.C.A. § 1001; Social Security Act, § 1801 et seq., 42 U.S.C.A. § 1395 et seq.

5. Conspiracy Key27

In prosecution for making wilful misrepresentations on claim forms for payment from United States for physical therapy services, and for conspiracy, conduct of defendant doctor subsequent to time that claims were filed by nonphysician defendant was germane only to extent that such conduct supported inference that he had planned with such nonphysician defendant to file the claims containing the misrepresentation, and physician's conduct upon receipt of checks in payment of claims could not constitute overt act in furtherance of conspiracy, which had run its course eo instante upon filing of the claims. 18 U.S.C.A. §§ 371, 1001; Social Security Act, § 1801 et seq., 42 U.S.C.A. § 1395 et seq.

6. Conspiracy Key47(6)

In prosecution for unlawfully and knowingly making false statements as to material facts to government agency, and for conspiracy, evidence was insufficient to sustain conviction of physician defendant for conspiracy though it was sufficient to sustain conviction of nonphysician defendant, for falsely certifying that physician had supervised rendition of physical therapy services, and for conspiracy. 18 U.S.C.A. §§ 371, 1001; Social Security Act, § 1801 et seq., 42 U.S.C.A. §1395 et seq.

7. Conspiracy Key23

Where evidence was insufficient to sustain conviction of one of two defendants for conspiracy, conviction of second defendant on conspiracy charge was also reversed. 18 U.S.C.A. § 371.

8. Criminal Law Key1188

Where neither appellant joined motion for new trial with motions for judgment of acquittal, appropriate disposition on finding insufficient evidence to sustain conspiracy convictions was to reverse and remand with directions that indictments be dismissed as to the conspiracy counts. 18 U.S.C.A. § 371.

Appeals from the United States District Court for the Northern District of Texas.

Before JOHN R. BROWN, Chief Judge, and GEWIN and GOLDBERG, Circuit Judges.

GEWIN, Circuit Judge:

This appeal is taken from a judgment of conviction entered against Dr. Donald Peterson for conspiring to defraud an agency of the United States Government, in violation of 18 U.S.C. § 371 (1970). [1] His brother and alleged

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1. 18 U.S.C. § 371 (1970):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

co-conspirator, James E. Peterson, also before us on appeal, was convicted under the conspiracy charge and on a number of counts under 18 U.S.C. § 1001 (1970) [2] alleging the substantive offenses of unlawfully and knowingly making false statements of material facts to a government agency. They were tried jointly before a jury which found them guilty. The prevarication is designated as the allegedly false certification that physical therapy rendered to patients at an extended care facility was provided by Dr. Peterson or under his personal auspices. Both appellants claim that numerous evidentiary errors were committed below and challenge the sufficiency of the evidence to support the jury's verdict. Finding these contentions to be of only limited efficacy, we reverse the conspiracy convictions but affirm James E. Peterson's conviction of the substantive offenses.

I

Before addressing the issues raised on appeal, it is instructive to consider the complicated statutory and factual background which gave rise to the instant prosecutions. James E. Peterson is the owner of Concord Manor, a nursing home approved by the Social Security Administration as an extended care facility and hence

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2. 18 U.S.C. § 1001 (1970):

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or documents knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The meaning of this statute is at issue in United States v. Lambert, 470 F.2d 354 (5th Cir. 1972) rehearing en banc granted April 17, 1973.

qualified to receive payment for hospital benefits rendered to the aged under Title XVIII, Health Insurance for the Aged of the Social Security Act, popularly denominated the Medicare Act. [3] The Act prescribes a bifurcated scheme of remuneration to those extending aid to the elderly. Under Part A, an extended care facility making outlays for room and board and nursing services may be compensated on a per diem rate determined by agreement with its fiscal intermediary, here Mutual of Omaha. [4] Under Part B, doctors rendering physical therapy are remunerated directly by a second fiscal intermediary, here the Group Medical and Surgical Service (Blue Cross-Blue Shield). Prior to July 1, 1968, Part B claims were required to be filed by a physician on government Form SSA—1490D(2), and could not be filed by a nursing home or medical organization comprised of physical therapists. [5] The 1968 amendment, however, altered this filing and compenstion procedure by enabling a group of therapists, who form an organization to provide physical therapy and enter into agreements with extended care facilities to render the therapy prescribed by a

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[3] 42 U.S.C. § 1395 et seq. (1970).

[4] Each provider of services under the Act has a fiscal intermediary who is responsible for insuring the integrity of the program and paying the bills for services rendered by the provider to Medicare beneficiaries.

[5] The only way in which Concord Manor could recoup the expenses incurred would be under the Part A cost per diem agreed to by Concord and its fiscal intermediary. During the period in which the alleged felonious conduct took place, Concord's per diem rate was $12. The Government claims the filing scheme devised herein was fashioned in order to circumvent the limitations on returns for services rendered under Part A. Under Part B, the claimant could obtain full remuneration for physical therapy. Thus, the remittance by Dr. Peterson of claims for payments enabled Concord Manor to procure greater compensation. Dr. Peterson professed ignorance of the differences in filing under Parts A & B.

patient's doctor, to bill directly for their services. It was this amendment which spurred the organization of Zodiac, Inc. by James Peterson and the fraternal interplay between James and Doctor Peterson. At his brother's behest Dr. Peterson enlisted as medical advisor to Zodiac, responsible for drafting procedures which would enable it to qualify as a "provider of services." Upon such qualification, Zodiac would be entitled, under the new amendment, to bill directly for costs incurred in administering physical therapy to Medicare patients.

We turn now to the occurrences which gave rise to the institution of criminal proceedings against the two defendants. During the first six months of 1968, Zodiac furnished physical therapy to patients at Concord Manor. This therapy was administered by a registered physical therapist and two therapy aides. Dr. Peterson's involvement was purportedly confined to drafting procedures for submission to the Social Security agency, pursuant to the new amendment. Nevertheless, in 1969, Group Medical and Surgical Service received requests under his name for payment of medical insurance benefits for Zodiac patients receiving physical therapy from January to June 1968. These requests were submitted on Form SSA—1490D(2), alluded to above, which in box #14, required that the administering doctor, here Dr. Peterson, certify that he either supplied the services or had them provided under his personal direction. [6] The forms re-

[6] The full text of box 14 contained on the claim filed with Group Medical and Surgical Service is as follows:

Signature of physician or supplier (a physician's signature certified that physician's services were personally rendered by him or under his personal direction).

ceived contained Dr. Peterson's signature, subsequently learned to have been forged, his personal supplier number, and a post office box address substituted for Dr. Peterson's registered address. The change of address was intended to divert the checks from Dr. Peterson's address to that of Zodiac. This was an abortive effort because Dr. Peterson's supplier number and address were unique to him and payment would be sent to Dr. Peterson automatically notwithstanding the change of address. Ignorant of the forgery and disregarding, as required, the substituted address, Group Medical and Surgical Service remitted claims payments to Dr. Peterson, who after depositing them in his Dallas Clinic Account, upon the same day he received them, drew a new check for the same amount payable to the order of Zodiac. Both convictions stem from the conduct engaged in with respect to the filing of the claims.

II

The fraternal bond, welded by the joint employment of Dr. James Peterson in the Zodiac endeavors, appears to have been dissipated by the advancement of divergent theories for upsetting their convictions. The only semblance of unity retained throughout this appeal is that both claim that the prosecutors and the jury made "much ado about nothing." The premise underlying James Peterson's claim is that his brother was sufficiently involved in the operations of Zodiac affairs to dispel any inference that he, James Peterson, perpetrated a fraud in filing the claims. Conversely, the premise underlying Dr. Peterson's claim is that the evidence of his involvement in Zodiac affairs and the filing of claims is so meagre that he could

not be found to have participated in the conspiracy. We consider their precise contentions advanced seriatim.

[1-4] James Peterson raises four contentions on appeal, each of which is devoid of merit. The first is that the lower court erred in excluding certain documents relating to Zodiac's qualification as a provider of services and two prior indictments which were dismissed. Second, the government's suppression of a letter from HEW addressed to Zodiac warranted reversal under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). And third, the lower court erred in failing to give requested charges and instructions which would have clarified the meaning of the phrase "under his personal direction." Each of these contentions fails, the first because under F.R.Cr.Proc. 26, it was within the district court's discretion to exclude the proffered evidence and such discretion was not abused in the instant case, see *United States v. Twilligear*, 460 F.2d 79,81 (10th Cir. 1972); *United States v. Skillman*, 442 F.2d 542, 551 (8th Cir.), cert. denied, 404 U.S. 833, 92 S.Ct. 82, 30 L.Ed.2d 63 (1971), the second, because James Peterson's characterization of the government's action with respect to the HEW letter as suppression is illusory, and the third, because the trial judge's instructions encompassed the substance of what James Peterson desired to have the court propound to the jury. A more formidable impediment to the efficacy of these evidentiary arguments is that the excluded evidence would be germane only if the theory upon which his defense is predicated were viable. This theory is that the meaning of the terminology "under his personal direction" contained in box 14 of Form SSA—1490D(2) was ambiguous and hence any misrepresentation in filing the

claims for payment was attributable to inadvertence and not to willfulness. The excluded evidence arguably gave credence to the view that some ambiguity prevailed.[7] However, whatever force his theory has derives largely from its generality, for the overwhelming evidence established that Dr. Peterson did not in fact supervise the administering of physical theraphy to any particular Zodiac patients. The inefficacy of his theory invariably condemns James Peterson's fourth challenge, raised below through a motion for judgment of acquittal, and pressed here that the evidence was insufficient to support the jury's finding that he had made willful misrepresentations on the claim forms filed with Group Medical and Surgical Service. Evidence of Dr. Peterson's non-involvement in administering physical therapy clearly supports the jury's finding in this regard. Thus, James Peterson's conviction on the substantive counts must stand.

Dr Peterson objects on appeal to two evidentiary rulings[8] and the sufficiency of the evidence to support the jury's finding that he participated in a conspiracy to de-

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7. The excluded evidence tended to show that confusion existed as to whether a physician had to be physically present for physical therapy to be administered under his personal supervision or whether it sufficed if he gave written instructions concerning the proper therapy to be given a particular patient. The dubious inferences drawn by James Peterson from the excluded indictments and the purportedly suppressed HEW letter were claimed to buttress his view concerning the ambiguity in standards.

8. Dr. Peterson objected to the exclusion of evidence that prior to indictment he had initiated a civil suit against HEW to recover Medicare payments withheld from him. He claimed that the instant indictment was procured in retaliation to the civil suit. He also claimed that evidence that Concord's fiscal intermediary suspended payments because of Concord's failure to file annual cost reports as required under Part A was irrelevant as to him and that its admission "probably" influenced the jury in its consideration of his guilt under the conspiracy count.

fraud the government. He had raised this sufficiency objection in the district court by means of a motion for judgment of acquittal when the government rested its case, again when James Peterson rested his defense and reiterated it when all parties had closed their testimony by way of an objection to the submission of the case under the district court's charge. We confine our resolution to the sufficiency grounds.

Under estabiished judicial precedent, a jury verdict must be sustained if there is substantial evidence when viewed in a light most propitious to the government, to support it. See *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Hernandez,* 484 F.2d 86, 87 (5th Cir. 1973); *United States v. Arroyave,* 477 F.2d 157, 163 (5th Cir. 1973); *Lacaze v. United States,* 391 F.2d 516,519 (5th Cir. 1968). This rule, while dictating that deference be extended to jury findings, does not immunize them from attack. An examination of the evidence convinces us that Dr. Peterson's challenge is well-founded.

[5] In reviewing the evidence marshalled by the government in support of the conspiracy charge, it is critical to note that conduct of Dr. Peterson subsequent to the time that claims were filed with Group Medical and Surgical Service is germane only to the extent that such conduct supports the inference that he had planned with James Peterson to file the claims containing the misrepresentation. Since the conspiracy had run its course *eo instante* upon the filing of these claims, Dr. Peterson's conduct upon receipt of checks in payment of claims could

not constitute an overt act in its furtherance.[9] See *Bollenbach v. United States*, 326 U.S. 607, 611, 66 S.Ct. 402, 404, 90 L.Ed. 350, 353 (1946).

[6] The record is devoid of evidence, prior to Dr. Peterson's receipt of claims checks from Group Medical, which supports the conclusion that he had engaged in the alleged conspiracy.[10] Dr. Peterson steadfastly adhered to the position that he never directed the administering of physical therapy to Medicare patients and that he was ignorant of the forgery of his signature on Form SSA—1490D(2). His testimony was corroborated by Helen Maeker, the registered physical therapist, and Lucille Morton, the secretary who at James Peterson's behest, forged Dr. Peterson's signature and attempted to substitute a post office box number for Dr. Peterson's regis-

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9. An examination of the indictment, the evidence and the position taken by the government at trial and on appeal clearly demonstrates that the essential basis of the charges was not that the appellants defrauded the Government out of money but rather that they made false statements to a government agency which impeded the functioning of that agency. Representative of the Government's position is the opening statement of its attorney at trial:

Now count 40 is a conspiracy count. What the Government would show, as far as conspiracy is concerned, is not that they were out to defraud the Government. We are not claiming that there was, it was conspiracy to defraud the Government but not for money.

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10. The grand jury charges alleged that nine overt acts were committed in furtherance of the conspiracy. The first overt act as James Peterson's application for a post office box in the name of Concord Manor, the next 5 pertained to Dr. Peterson's alleged action in causing the Form SSA—1490D(2) to be mailed, and the last 3 consisted of the sequence of events transpiring subsequent to Dr. Peterson's receipt of the claims.

tered address listed on the claims form. [11] Moreover, it is uncontroverted that Dr. Peterson expressly disavowed any intention to bill for services performed by Zodiac during his abbreviated affiliation and that he severed relations with Zodiac after July 1, 1968, a substantial period of time before March 1, 1969, the date the alleged conspiracy transpired. Finally, there is no evidence that he saw, much less conversed with James Peterson after his disaffiliation, other than upon the day the claims checks were remitted to him. Hence, the jury verdict can only be sustained if Dr. Peterson's conduct upon receiving the checks supports the inference that he had preordained the false filing engineered by James Peterson.

The evidence adduced by the government at trial established that upon receipt of payment checks from Group Medical totaling $18,000, Dr. Peterson reported their arrival to his brother, deposited them in his clinic account, personally wrote a new check designated accounts payable to Zodiac for the entire amount and delivered it to Zodiac on the very same day.[12] Dr. Peterson

11. As previously indicated in the body of this opinion, under the Part B program computerized by Group Medical and Surgical Service, each provider of services is furnished with a provider number, unique to the supplier of services, which is used on all requests for payment. The supplier also registers an address with the fiscal intermediary to which all claims payments are remitted. The registered address and supplier number serve as controls against disruption of the proper administration of payments made by the fiscal intermediary.

12. Dr. Peterson explained the accounts payable designation on the check as purely a bookkeeping notation which would indicate receipts and disbursement of funds of equal amounts resulting in no gain to him. Dr. Peterson's treatment of the payment to Zodiac as a business deduction on his tax form was approved by the IRS.

admitted that he took this action without making any attempt to contact Group Medical and Surgical Service about the checks and despite the fact that he knew the claims did not involve any of his own patients and that he had not authorized submission of the claims in his own name. The government also attributed significance to testimony elicited on cross-examination of Dr. Peterson which in allegedly impugning his credibility, reflected upon the mendacity of his assertions of noninvolvement in the claims filed.[13]

The countervailing evidence and that which compels the conclusion that the jury's inference of conspiracy must be set aside revolves around the actions of the alleged confederate, James Peterson. His conduct, in forging his brother's signature, in supplying his supplier number, and in altering his registered address on the claims filed with Group Medical reflects a protracted effort to divert the checks from Dr. Peterson. Such an ef-

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13. The source of the impeaching testimony was a deposition given by Dr. Peterson in the civil suit he filed against HEW and a letter to a program integrity specialist of HEW. In the deposition Dr. Peterson responded that he was "acquainted" with Zodiac Enterprises but "did not know" what it was. In the letter Dr. Peterson explained that he billed for services in order to pay the salaries of therapists. Although these responses lack the lucidity which characterize his denial of involvement, they are not as conclusive of Dr. Peterson's credibility as the Government would have us believe. Dr. Peterson's responses in the deposition are so patently inconsistent that they could hardly be attributed to anything other than his misunderstanding of the question propounded. With respect to the letter, Dr. Peterson also maintained that he was uncertain whether he told the integrity specialist that he had billed for services, thereby suggesting that there was a difference between the claims for salaries he admittedly filed and the claims for services which were the object of the instant proceedings. That the letter referred to different claims belies the impeaching force ascribed to it by the government.

fort would appear to be inexplicable if Dr. Peterson were involved in the scheme. In short, Dr. Peterson's conduct appears to be more pickwickian than conspiratorial.

Moreover, we cannot overlook the fact that Dr. Peterson was exonerated of the charges contained in the 39 substantive counts of the indictment. Concededly, a conspiracy to commit a crime is a separate and distinct crime from the substantive offense. See *Callanan v. United States*, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312, 317 rehearing denied, 365 U.S. 825, 81 S.Ct. 687, 5 L.Ed.2d 703 (1961); *United States v. Jasso*, 442 F.2d 1054, 1056 (5th Cir.), cert denied, 404 U.S. 845, 92 S.Ct. 146, 30 L.Ed.2d 81 (1971); *Downing v. United States*, 348 F.2d 594, 600 (5th Cir.), cert. denied, 382 U.S. 901, 86 S.Ct. 235, 15 L.Ed.2d 155 (1965). But this distinction may become tenuous where, after receiving an "aiding or abetting" charge, a jury exonerates a defendant on the substantive count the elements of which closely approximate, if not parallel, the overt acts alleged in the conspiracy charge. We do not mean to suggest that were additional evidence of conspiracy adduced at trial a jury verdict of guilty on the conspiracy count alone would invariably require reversal. Rather, based on the unique facts presented in the record, it is difficult to conceive of how the jury could exculpate Dr. Peterson as an aider or abettor but yet inculpate him as a confederate.

III

[7, 8] For the aforementioned reasons, we hold that the jury lacked sufficient evidence to find Dr. Peterson guilty of conspiracy to defraud an agency of the United

States Government. Concomitantly, since this absolution removes James Peterson's confederate, his conviction on the conspiracy charge must also be reversed. Since neither appellant joined a motion for a new trial with their motions for judgment of acquittal, the appropriate disposition is to reverse and remand with directions that the indictments be dismissed as to the conspiracy counts.[14] See *United States v. Apollo*, 476 F.2d 156, 158 n. 1 (5th Cir. 1973); *United States v. Musquiz*, 445 F.2d 963, 966 (5th Cir. 1971); 2 Wright, Federal Practice & Procedure § 470 (Supp. 1973). Since we discern no infirmity in James Peterson's conviction on the substantive counts, we affirm as to that part of the judgment of conviction.

Affirmed in part; reversed and remanded with instructions to dismiss the conspiracy count of the indictment.

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14. Even if the record disclosed a motion for a new trial our conclusion would not be altered. The record convinces us that the Government has been given a full and fair opportunity to present all the evidence available on the conspiracy charge. The facts have been fully developed and no useful purpose would be served by another conspiracy trial.

Appendix B

The following are the pertinent text of constitutional provisions, treaties, statutes, ordinances and regulations involved in James Eugene Peterson's case.

UNITED STATES CONSTITUTION FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

UNITED STATES CONSTITUTION SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; . . .'

UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TITLE 18 U. S. C. A. § 371

"If two or more persons conspire either to commit any offense against the United States, or to de-

fraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

TITLE 18 U. S. C. A. § 1001

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

TITLE 28 U. S. C. A. §1254 (1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

TITLE 42 U.S.C.A. § 301

§ 301. Appropriation

For the purpose (a) of enabling each State, as far as practicable under the conditions in such State, to furnish financial assistance to aged needy individuals, (b) of en-

abling each State, as far as practicable under the conditions in such State, to furnish medical assistance on behalf of aged individuals who are not recipients of old-age assistance but whose income and resources are insufficient to meet the costs of necessary medical services, and (c) of encouraging each State, as far as practicable under the conditions in such State, to furnish rehabilitation and other services to help individuals referred to in clause (a) or (b) to attain or retain capability for self-care, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare (hereinafter referred to as the "Secretary"), State plans for old-age assistance, or for medical assistance for the aged, or for old-age assistance and medical assistance for the aged.

Aug. 14, 1935, c. 531, Title I, § 1, 49 Stat. 620; 1946 Reorg.Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 28, 1950, c. 809, Title III, Pt. 6, § 361(a), 64 Stat. 558; 1953 Reorg.Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2052, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 311(a), 70 Stat. 848; Sept. 13, 1960, Pub.L. 86—778, Title VI, § 601(b), 74 Stat. 987; July 25, 1962, Pub.L. 87—543, Title I, § 104(c) (1), 76 Stat. 185.

Historical Note

1962 Amendment. Pub.L. 87—543 eliminated from cl. (a) the provision relating to the purpose of encouraging each State, as far as practicable under the conditions in the State, to help aged needy individuals attain self-care, and added cl. (c) incorporating the eliminated provision.

TITLE 42 U.S.C.A. § 1395

§ 1395. Prohibition against any Federal interference

Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person.

Aug. 14, 1935, c. 531, Title XVIII, § 1801, as added July 30, 1965, Pub.L. 89—97, Title I, § 102(a), 79 Stat. 291.

Historical Note

Short Title. Section 100 of Pub.L. 89—97 provided that: "This title [which enacted this subchapter, sections 426, 907, and 1396—1396d of this title, and section 228s-2 of Title 45, amended sections 303, 401, 401a, 402, 418, 603, 1203, 1301, 1306, 1309, 1315, 1353, 1383, and 1395kk of this title sections 72, 79, 213, 401, 405, 1401, 3101, 3111, 3201, 3211, 3221, and 6051 of Title 26 and sections 228e and 228s—2 of Title 45, and enacted provisions set out as notes under sections 426, 1301, 1309, 1315, 1395*l*, 1395*o*, 1395p, and 1396b of this title, sections 213 and 3201 of Title 26, and section 228s—2 of Title 45] may be cited as the 'Health Insurance for the Aged Act'."

Legislative History. For legislative history and purpose of Pub.L. 89-97, see 1965 U.S.Code Cong. and Adm.News, p. 1943.

TITLE 42 U.S.C.A. § 1395a

§ 1395a. Free choice by patient guaranteed

Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services.

Aug. 14, 1935, c. 531, Title XVIII, § 1802, as added July 30, 1965, Pub.L. 89-97, Title I, § 102(a), 79 Stat. 291.

TITLE 42 U.S.C.A. § 1395c

§ 1395c. Description of program

The insurance program for which entitlement is established by section 426 of this title provides basic protection against the costs of hospital and related post-hospital services in accordance with this part for individuals who are age 65 or over and are entitled to retirement benefits under subchapter II of this chapter or under the railroad retirement system.

Aug. 14, 1935, c. 531, Title XVIII, § 1811, as added July 30, 1965, Pub.L. 89-97, Title I, § 102(a), 79 Stat. 291.

TITLE 42 U.S.C.A. § 1395(f)(e)

§ 1395(f)(e) Payment for inpatient hospital services prior to notification of noneligibility

(e) Notwithstanding that an individual is not entitled to have payment made under this part for inpatient hospital services furnished by any hospital, payment shall be made to such hospital (unless it elects not to receive such payment or, if payment has already been made by or on behalf of such individual, fails to refund such payment within the time specified by the Secretary) for such services which are furnished to the individual prior to notification to such hospital from the Secretary of his lack of entitlement, if such payments are precluded only by reason of section 1395d of this title and if such hospital complies with the requirements of and regulations under this

subchapter with respect to such payments, has acted in good faith and without knowledge of such lack of entitlement, and has acted reasonably in assuming entitlement existed. Payment under the preceding sentence may not be made for services furnished an individual pursuant to any admission after the 6th elapsed day (not including as an elapsed day Saturday, Sunday, or a legal holiday) after the day on which such admission occurred.

TITLE 42 U.S.C.A. § 1395k

§ 1395k. Scope of benefits; definitions

(a) The benefits provided to an individual by the insurance program established by this part shall consist of—

(1) entitlement ot have payment made to him or on his behalf (subject to the provisions of this part) for medical and other health services, except those described in paragraph (2) (B); and

(2) entitlement to have payment made on his behalf (subject to the provisions of this part) for—

(A) home health services for up to $100 visits during a calendar year;

(B) medical and other health services (other than physicians' services unless furnished by a resident or intern of a hospital and the services for which payment may be made pursuant to section 1395n(b) (2) of this title) furnished by a provider of services or by others under arrangements with them made by a provider of services; and

(C) outpatient physical therapy services.

(b) For definitions of "spell of illness", "medical and other health services", and other terms used in this part, see section 1395x of this title.

Aug. 14, 1935, c. 531, Title XVIII, § 1832, as added July 30, 1965, Pub.L. 89-97, Title I, § 102(a), 79 Stat. 302, and amended Jan. 2, 1968, Pub.L. 90-248, Title I, §§ 129(c) (6) (B), 133(d), 81 Stat. 848, 851.

Historical Note

1968 Amendment. Subsec. (a) (2) (B). Pub.L. 90-248 § 129(c) (6) (B), inserted "and the services for which payment may be made pursuant to section 1395n(b) (2) of this title" after "hospital".

Subsec. (a) (2) (C). Pub.L. 90-248, § 133(d), added subpar. (C).

Effective Date of 1968 Amendment. Amendment of subsec. (a) (2) (B) of this section by section 129(c) (6) (B) of Pub.L. 90-248, applicable with respect to services furnished after March 31, 1968, see section 129(d) of Pub.L. 90-248, set out as a note under section 1395d of this title.

Section 133(g) of Pub.L. 90-248 provided that: "The amendments made by the preceding subsections of this section [to subsec. (a) (2) of this section and sections 1395n(a) (2), 1395x(p), (s) (2) (D), 1395aa(a) and 1395cc(e) of this title] shall apply to services furnished after June 30, 1968."

Legislative History. For legislative history and purpose of Pub.L. 89-97, see 1965 U.S.Code Cong. and Adm.News, p. 1943. See, also, Pub.L. 90-248, 1967 U.S. Code Cong. and Adm.News, p. 2834.

TITLE 42 U.S.C.A. § 1395x(h)

§ 1395(x)(h) Extended care services

(h) The term "extended care services" means the following items and services furnished to an inpatient of an extended care facility and (except as provided in paragraphs (3) and (6)) by such extended care facility—

(1) nursing care provided by or under the supervision of a registered professional nurse;

(2) bed and board in connection with the furnishing of such nursing care;

(3) physical, occupational, or speech therapy furnished by the extended care facility or by others under arrangements with them made by the facility;

(4) medical social services;

(5) such drugs, biologicals, supplies, appliances, and equipment, furnished for use in the extended care facility, as are ordinarily furnished by such facility for the care and treatment of inpatients;

(6) medical services provided by an intern or resident-in-training of a hospital with which the facility has in effect a transfer agreement (meeting the requirements of subsection (b) of this section), under a teaching program of such hospital approved as provided in the last sentence of subsection (b) of this section, and other diagnostic or therapeutic services provided by a hospital with which the facility has such an agreement in effect; and

(7) such other services necessary to the health of the patients as are generally provided by extended care facilities;

excluding, however, any item or service if it would not be included under subsection (b) of this section if furnished to an inpatient of a hospital.

TITLE 42 U.S.C.A. § 1395x(p)

Outpatient physical therapy services

(p) The term "outpatient physical therapy services" means physical therapy services furnished by a provider

of services, a clinic, rehabilitation agency, or a public health agency, or by others under an arrangement with, and under the supervision of, such provider, clinic, rehabilitation agency, or public health agency to an individual as an outpatient—

(1) who is under the care of a physician (as defined in subsection (r) (1) of this section), and

(2) with respect to whom a plan prescribing the type, amount, and duration of physical therapy services that are to be furnished such individual has been established, and is periodically reviewed, by a physician (as so defined);

excluding, however—

(3) any item or service if it would not be included under subsection (b) of this section if furnished to an inpatient of a hospital; and

(4) any such service—

(A) if furnished by a clinic or rehabilitation agency, or by others under arrangements with such clinic or agency, unless such clinic or rehabilitation agency—

(i) provides an adequate program of physical therapy services for outpatients and has the facilities and personnel required for such program or required for the supervision of such a program, in accordance with such requirements as the Secretary may specify,

(ii) has policies, established by a group of professional personnel, including one or more physicians (associated with the clinic

or rehabilitation agency) and one or more qualified physical therapists, to govern the services (referred to in clause (i)) it provides,

(iii) maintains clinical records on all patients,

(iv) if such clinic or agency is situated in a State in which State or applicable local law provides for the licensing of institutions of this nature, (I) is licensed pursuant to such law, or (II) is approved by the agency of such State or locality responsible for licensing institutions of this nature, as meeting the standards established for such licensing; and

(v) meets such other conditions relating to the health and safety of individuals who are furnished services by such clinic or agency on an outpatient basis, as the Secretary may find necessary, or

(B) if furnished by a public health agency, unless such agency meets such other conditions relating to health and safety of individuals who are furnished services by such agency on an outpatient basis, as the Secretary may find necessary.

TITLE 42 U.S.C.A. § 1395x(q)

§ 1395x(q) Physicians' services

(q) The term "physicians' services" means professional services performed by physicians, including sur-

gery, consultation, and home, office, and institutional calls (but not including services described in the last sentence of subsection (b) of this section).

TITLE 42 U.S.C.A. § 1395x(s)

Medical and other health services

(s) The term "medical and other health services" means any of the following items or services:

(1) physicians' services;

(2) (A) services and supplies (including drugs and biologicals which cannot, as determined in accordance with regulations, be self-administered) furnished as an incident to a physician's professional service, of kinds which are commonly furnished in physician's offices and are commonly either rendered without charge or included in the physicians' bills;

(B) hospital services (including drugs and biologicals which cannot, as determined in accordance with regulations, be self-administered) incident to physicians' services rendered to out-patients;

(C) diagnostic services which are—

(i) furnished to an individual as an outpatient by a hospital or by others under arrangements with them made by a hospital, and

(ii) ordinarily furnished by such hospital (or by others under such arrangements) to its outpatients for the purpose of diagnostic study; and

(D) outpatient physical therapy services;

(3) diagnostic X-ray tests (including tests under the supervision of a physician, furnished in a place of residence used as the patient's home, if the performance of such tests meets such conditions relating to health and safety as the Secretary may find necessary), diagnostic laboratory tests, and other diagnostic tests;

(4) X-ray, radium, and radioactive isotope therapy, including materials and services of technicians;

(5) surgical dressings, and splints, casts, and other devices used for reduction of fractures and dislocations;

(6) durable medical equipment, including iron lungs, oxygen tents, hospital beds, and wheelchairs used in the patient's home (including an institution used as his home other than an institution that meets the requirements of subsection (e) (1) or (j) (1) of this section) whether furnished on a rental basis or purchased;

(7) ambulance service where the use of other methods of transportation is contraindicated by the individual's condition, but only to the extent provided in regulations;

(8) prosthetic devices (other than dental) which replace all or part of an internal body organ, including replacement of such devices; and

(9) leg, arm, back, and neck braces, and artificial legs, arms, and eyes, including replacements if required because of a change in the patient's physical condition.

No diagnostic tests performed in any laboratory which is independent of a physician's office or a hospital (which, for purposes of this sentence, means an institution considered a hospital for purposes of section 1395f(d) of this title) shall be included within paragraph (3) unless such laboratory—

(10) if situated in any State in which State or applicable local law provides for licensing of establishments of this nature, (A) is licensed pursuant to such law, or (B) is approved, by the agency of such State or locality responsible for licensing establishments of this nature, as meeting the standards established for such licensing; and

(11) meets such other conditions relating to the health and safety of individuals with respect to whom such tests are performed as the Secretary may find necessary.

There shall be excluded from the diagnostic services specified in paragraph (2) (C) any item or service (except services referred to in paragraph (1)) which—

(12) would not be included under subsection (b) of this section if it were furnished to an inpatient of a hospital; or

(13) is furnished under arrangements referred to in such paragraph (2) (C) unless furnished in the hospital or in other facilities operated by or under the supervision of the hospital or its organized medical staff.

None of the items and services referred to in the preceding paragraphs (other than paragraphs (1) and (2) (A)) of this subsection which are furnished to a patient of an institution which meets the definition of a hospital for purposes of section 1395f(d) of this title shall be included unless such other conditions are met as the Secretary may find necessary relating to health and safety of individuals with respect to whom such items and services are furnished.

APPENDIX C TO PETITION FOR WRIT OF CERTIORARI

This Appendix contains excerpts from the testimony of Lucille Morton as given by her in a deposition taken in Cause No. CA 3-5158 in the Northern District of Texas wherein the United States Government seeks to recover monetary penalties from Dr. Donald Peterson and James E. Peterson for alleged violations of the False Claims Act. This Appendix also contains excerpts from the testimony of Lucille Morton in the trial on the merits in such civil case. The transcript of testimony from the trial on the merits in this civil case has been filed with the United States Court of Appeals for the Fifth Circuit in Cause No. 74-1067. Lucille Morton's testimony in the trial on the merits in such civil case appears in Volume 1 at page 289 et seq.

For convenience this Appendix is informally numbered in the center of each page with a "C" in front of the number to differentiate it from the Petition for Writ of Certiorari and Appendixes A and B. Direct quotations from the deposition and the civil case testimony appear in Italics.

Deposition Testimony

Lucille Morton kept accounts receivable, sent out statements and had responsibility for Part A Medicare Claims (Dep. p. 16-1. 3-8). She operated independently (p. 16-1. 9-12). Mr. Peterson gave instructions in respect to Part A about being meticulous and making sure that everything was done right (p. 21-1. 16-25). He did not interfere with her performance of her duties and responsi-

bilities (p. 22-1. 1-4). Her first experience with Part B clause was:

> *"When I prepared those in Concord Manor's Office on Dr. Peterson's forms, maybe in April of '69."* (Dep. p. 35-1. 10-12).

The first occasion when she received any instructions or heard any comments, or had anything, any knowledge of Part B clause for physical therapy was:

> *"When Mr. Peterson came to my office sometime in the early part of '69, wanting the physical therapy prior to July 1 billed on Dr. Peterson's forms."* (Dep. p. 35-1. 25 and p. 36-1. 1 & 2).

She stated that she wasn't concerned about having signed Dr. Peterson's name on the documents, *"Because I was instructed to"* (Dep. p. 38-1. 10). This is consistent with her testimony at the trial on the criminal case where she testified *"that James E. Peterson instructed her to sign."* (Vol. II, p. 300-1. 1-4, also at Vol. II, p. 307-1. 1-4).

It is the contention of Defendant, James E. Peterson that the only instruction given to her was to prepare the forms. He had not instructed her to forge Dr. Peterson's name. He had not instructed her to send in the forms. His only instruction was the general one of getting them prepared. Lucille Morton takes this general instruction and extrapolates it to mean that she was to forge the signature and mail it.

Her testimony at all three hearings when viewed in this light supports Defendant Peterson's position. Witness beginning at p. 38, 1. 15:

> *"Q. Going back to the time when Mr. Peterson talked with you first about these Part B Claims, did he have anything with him at that time, claim forms or any other documents?*

"A. He had a box of physical therapy slips that he brought to my office and they went even back further than '68. They had been in Dr. Peterson's office, I assume, because he stated that his nurse, Patsy Predmore, had gotten some out and was supposed to have gotten all of them out, but she did not do it, so she brought them over for me to do.

"Q. All right. What further instructions were given at the time?

"A. I was told to get them out and get them into Blue Cross. **[Parenthetically contrast this with her testimony at p. 94-1. 11-21 where she again takes a general instruction and extrapolates].**

Q. Can you recall just generally what was said or are you able to recall specifically what was said?

"A. Not specifically, no.

"Q. Would it be fair to state that in general, then, that Mr. Peterson wanted to get these claim forms prepared?

"A. Yes.

"Q. Get behind—

"A. Yes.

"Q. Moving it on?

"A. (Witness nods head.)

"Q. Were the claim forms which were furnished to you blank forms, completely blank?

"A. Yes.

"Q. What other information was given to you?

"A. To have a supplier number beside the blank forms.

"Q. Now, okay. Was that given to you?

"A. Yes.

"Q. How did you know how to go about completing these forms?

"A. Well, you have a picture of it in the manual and telling you the proper way to complete a form.

"Q. Now so that you did have a manual that you could go by?

"A. Yes. Medicare Manual, it's supplied to nursing homes, doctors' offices.

"Q. And you had a copy there in your office?

"A. Yes.

"Q. Well, Mr. Peterson did not have to give you any instructions, specifically about how to fill out the form, because the manual was there for you?

"A. That's right. And not only that, but it's common sense when you look at it what you're supposed to put down." (Dep. p. 38-1. 15 thru p. 40-1. 14). On Page 52, beginning with line 12 we find the following:

"Q. What was Mr. Peterson saying to you during this time about getting this stuff out?

"A. He wasn't saying anything after he told us to get on them and get them out.

"Q. So he gave you instructions from the beginning, and that was it?

"A. He didn't bother you, you know. Emphasis added.

"Q. So thereafter he did not look back over the things and—you were carrying out your job and went ahead and got them on out thereafter?

"A. Yes. . . ." (Dep. p.52-1. 12-22).

We find the following testimony at page 92, 1. 12 to 93, 1. 12:

"Q. You testified earlier that Mr. Peterson made some comment to you at the time he gave you these instructions about the preparing of the Part B forms. Now, there was some comment made about the nurse not having been able to get them ready or something.

"A. Miss Predmore, which was Dr. Peterson's secretary?

"Q. Go ahead.

"A. Had billed a lot of them, she had not completed them. So she supposedly did not have the time to complete them.

"Q. And so this was the reason being asked—

"A. That's right.

"Q. And to get them over here.

"A. Right.

"Q. And then at this point in time **you cannot recall the exact words Mr. Peterson said in that conversation?**

"A. I cannot. Emphasis added.

"Q. So it's only a matter of the general substance that you are now able to recall?

"A. That's right.

"Q. I understand the basic thrust is here the things that has to be done now, get on it?

"A. Make this priority."

The support for James E. Peterson that only a general instruction is given then is further found by the next exchange of questions and answers at page 93, line 23 thru page 94, line 21.

"Q. And what is your testimony as to the instructions given to you by Mr. Peterson in respects to the matter of signatures on these Part B forms?

"A. What was my testimony?

"Q. Or what is your testimony.

"A. **Mr. Peterson told me to get these out.**

"Q. **That's all?** (Emphasis added).

"A. **That's right.** *That's what Mr. Peterson said, get these billed and send them in, so Mrs. Short and I discussed who was going to sign what to get them out! So the decision of the signatures was mine and hers.*

"Q. And his instructions to you was to get them ready and get them sent in?

"A. That's right. (Emphasis added).

"Q. Did he say where sent in or just get them sent on? You knew they were for Dr. Peterson?

"A. Both of us knew that they had to go to Blue Cross-Blue Shield.

"Q. So he didn't have to tell you to send them to Blue Cross-Blue Shield?

"A. That's right. (Emphasis added).

"Q. All you had to do was get them sent in?

"A. That's right." (Dep. p. 93-1, 23 to p. 94-1. 21).

It's obvious from reading the testimony that Lucille Morton was given a general instruction which she misinterpreted. Look for example at the last question about sending the forms in. James E. Peterson was saying get them out. She interpreted this as saying send them in. Even if Peterson used the word send them in he would have been referring to send them in to Dr. Peterson for his review. She misinterpreted it and sent it to Blue Cross.

A further example of her way of thinking is found at page 53 of the deposition, line 4 to 15:

"Q. Did you ask Katherine Short to sign Helen Mathis' name up above on line six?

"A. I do not know.

"Q. Who did?

"A. Her being a co-worker, does she have to be told? She was there before I went there and was there when I left.

"Q. The manual that you had called for a signature and, the form, itself, called for a signature.

"A. Yes. We knew that two signatures had to be put down there." (Dep. p. 53-1. 4-15).

Also—"Mr. Peterson didn't tell me to tell Mrs. Short to do anything." (Dep. p. 54-1. 21).

She took it on herself to sign Dr. Peterson's name.

"Q. It was easier though to go ahead and sign Dr. Peterson's name, was it not?

"A. That's right." (Dep. p. 56-1. 10-12).

Peculiarly enough Dr. Peterson was Lucille's personal physician. (Dep. p. 10-1. 3-22), yet because it was easier and she had misinterpreted instructions she didn't send them to him.

Lucille Morton was a person who assumed things. Note the following:

"Q. The physician or supplier code number, that is for Dr. Peterson, himself?

"A. Right.

"Q. And Mr. James Peterson supplied you with that information?

"A. **He either did or had it done.** [Emphasis added—Note the Assumption]

"Q. How would he have had it done?

"A. This Lynn Latham that worked for them in the laboratory in the back, she went over to Dr. Peterson's office two or three times a week, go over and pick up blood when she had some. So she could pick up the forms or whatever they needed.

"Q. And is this the way you got some of the forms?

"A. I don't know if she did it or if someone else did it. I didn't actually see her.

"Q. You don't know then specifically how you got this physician or supplier code, the 9890, then?

"A. That's right. [The Fact]

"Q. Then I take it, also, from what you say, that you are not sure exactly how you got the blank forms then?

"A. (Witness shakes head.) I don't know who brought them and laid them on my desk, no.

"Q. Then there was the assignment of the patient bill: 'I accept assignment, I do not accept assignment,' and one was checked, 'I accept assignment.'

"Why was that one checked, do you know?

"A. Because—yes, Dr. Peterson accepts assignments.

"Q. And how did you know that?

"A. I just know that. They wouldn't be billing Medicare if they didn't accept assignments." (Assumption) (Dep. p. 48-1. 15 to p. 49-1. 22).

Also:

"Q. And from you all's standpoint you thought it was satisfactory to go ahead and sign her name because it was a routine matter?

"A. I assume so. (Assumption)

"Q. This is something that you and Mrs. Short worked out between the two of you?

"A. Yes." (Dep. p. 54-1. 9-15). (Fact)

CIVIL CASE—TRIAL ON MERITS

If we turn now to the testimony in the Civil case we find further support for James E. Peterson's position that he only gave a general instruction which Lucille Morton misinterpreted:

"Q. Each form has a signature or most of the forms have a signature, 'Donald M. Peterson'?

"A. Right.

"Q. Can you tell me whose signature that is?

"A. That's my signature.

"Q. All right. Why did you sign them?

"A. Well, we had to sign the patient's name and Dr. Peterson's name, so Miss Short and I decided that one of us would that one and one, the other, to send them in.

"Q. Did you ever discuss filling out of these forms with James Peterson?

"A. James Peterson told us to get them filled out. (General Instruction)

"Q. Did James Peterson tell you to sign Don—

MR. JORDAN: Okay, your Honor, he's leading.

"THE COURT: Sustained. You're leading.

"Q. (BY MR. MIGHELL) Well, I'll ask again—Well, did anyone tell you—

"MR. JORDAN: Your Honor, it's simple enough to ask what instructions were given.

"THE COURT: Yes, you can ask her what they told her.

"MR. MIGHELL: Well, she said James Peterson told her to get them out.

"Q. (By Mr. Mighell) **Did he tell you anything else about the forms?** (Emphasis Added)

"A. **He just told us to get them out as soon as possible.** (Emphasis added)

"Q. Had you ever prepared Part B claims before at Concord?

"A. I have not.

"Q. Had you ever signed a doctor's name to a statement prior to this?

"A. No, sir.

"Q. Why did you sign it to this one?

"A. **Mr. Peterson asked us to get it out** *so he could get the money back in."* (Tr. Vol. I, pg. 292, l. 8 to pg. 293, l. 23). (Emphasis Added).

Also:

"Q. All right. Now, when it came to the Part B billing, **why did you put Donald Peterson's name on it?** (Emphasis Added—Note Response).

"A. Well, Part B can only be billed through—on a doctor's provider number.

"Q. All right. Who gave you that provider number?

"A. It was brought and put on my desk.

"Q. Do you know who brought it in?

"A. No, sir, I do not.

"Q. All right. Somebody brought you the provider number. Who told you to put Donald M. Peterson's name on the form?

"A. Mr. Peterson gave us the instructions on all of this form." (Note—not specific instruction but general). (Tr. Vol. I, pg. 295-1. 12-24).

Referring to Katherine Short's signing of Helen Mathis' name, Lucille Morton was questioned:

"Q. Did you tell her to sign Helen Mathis' name?

"A. I did not.

"Q. Do you know who told Katherine Short to sign Helen Mathis' name?

"A. We were told to get the forms out, and there was two signatures to sign, so we decided between us one is as bad as the other to sign, so we chose the ones ourselves." (Tr. Vol. I, pg. 296-1. 23 to pg. 297-1. 5).

"Q. In connection with the Claims 1 thru 120, you've used the word 'told'; **'I was told to get the forms out.' Is this the instructions which Mr. Peterson gave to you?**

"A. **Yes, sir.** (Note she didn't detail).

"Q. You undertook to fulfill those instructions?

"A. I sure did.

"Q. Did you have access to manuals that dealt with how to fill out forms like this?

"A. Yeah, Blue Cross—Medicare sends the forms out, our manuals.

"Q. And you had access to the manual to give you instructions how to fill out the forms, of these forms that are in front of you?

"A. The forms are self-explanatory.

"Q. You worked from the explanations on the forms in completing—

"A. (interposing) That is right.

"Q. The general instructions which were given to you, as I have your testimony down, was to get out the physical therapy—these physical therapy bills—

"A. Right.

"Q. —and you went back into the files and through the slips, denoting who was Part A and who was Part B and so on; you had that information that was available to you?

"A. Yes, sir." (Tr. Vol. 1, pg. 305, l. 11 to pg. 306, l. 12).

A minute or two later she testifies:

"Q. And by virtue of your experience as the bookkeeper, then you knew where that information was, and was able to obtain it for the particular patient and put it on the forms; is that correct?

"A. Yes.

"Q. Now, that was part of the—or was this part of the instructions you were given?

"A. My instructions were to get them out.

"Q. Okay. That's really what all your instructions were, is just get these forms out.

"A. That's right." (Tr. Vol. 1, pg. 307 l. 7-17). (Emphasis added).

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1619

JAMES EUGENE PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 488 F. 2d 645.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1974 (Pet. App. A-1). A petition for rehearing was denied on March 29, 1974 (Pet. App. D-1). The petition for a writ of ceritorari was

filed on April 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1001 is constitutional as applied to statements on forms submitted for reimbursement for medical services under 42 U.S.C. 301, *et seq.*

2. Whether the trial judge properly instructed the jury.

3. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in United States District Court for the Northern District of Texas, petitioner was convicted on 39 counts of making false statements of material facts to a government agency, in violation of 18 U.S.C. 1001 and one count (Count 40) of conspiracy to do so, in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent terms of 13 months' imprisonment on each of Counts 1-38 and 40, with immediate eligibility for parole under 18 U.S.C. 4208(a)(2). On Count 39, petitioner was placed on probation for five years, the term to run consecutive to the imprisonment imposed. Petitioner was also fined $5,000 on each of Counts 1 and 40. Petitioner's brother, Dr. Donald Peterson, was convicted on the conspiracy count, Count 40, and placed on probation for five years and fined $10,000. The court of appeals reversed the conspiracy convictions of both defendants, but affirmed petitioner's convic-

tion on the substantive offenses (Counts 1-39) (Pet. App. A).[1]

The facts, which are also discussed in the opinion of the court of appeals (Pet. App. A-5—A-8), show that petitioner was the owner of Concord Manor, a nursing home approved by the Social Security Administration as an extended care facility and hence qualified to receive payment for hospital benefits rendered to the aged under the Medicare Act, 42 U.S.C. 1395, *et seq.* The Act prescribes a two-part scheme of remuneration to those extending aid to the elderly. Under Part A, an extended care facility may be compensated for room, board and nursing services at a per diem rate determined by agreement with its fiscal intermediary, here Mutual of Omaha. Under Part B, doctors rendering physical therapy are paid directly by a second fiscal intermediary, here Group Medical and Surgical Service of Blue Cross-Blue Shield. Prior to July 1, 1968, Part B claims were required to be filed by a physician individually on government form SSA-1490D(2), and could not be filed by a nursing home or medical organization comprised of physical therapists.[2] A 1968 amend-

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[1] In a separate civil suit, petitioner and Donald M. Peterson were ordered jointly and severally to repay the United States $31,606.72, representing double damages for 120 false claims, and an additional $100,000, representing a $2,000 forfeiture for 50 of the 120 false claims, together with interest thereon and costs. An appeal in the civil case is now pending before the Fifth Circuit, No. 74-1067.

[2] The only way in which Concord Manor could recoup its expenses would be under the Part A cost per diem agreed to

ment, however, altered the procedure by allowing a group of therapists, by forming an organization to provide physical therapy and entering into agreements with extended care facilities to render therapy prescribed by a patient's doctor, to bill directly for their services. It was this amendment which inspired petitioner's re-organization of Zodiac, Inc. At petitioner's behest, Dr. Donald Peterson was enlisted as an unpaid medical advisor to Zodiac,[3] responsible for drafting procedures that would entitle it, under the new amendments, to bill directly for costs incurred in administering physical therapy to Medicare patients (Tr. 374-376, 382, 475-480).[4]

The fraudulent claims involved in this case were for services during the first six months of 1968 be-

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by Concord Manor and Mutual of Omaha. When the conduct in question occurred, Concord's per diem rate was $12. The scheme here was fashioned to circumvent the limitations on payment for services rendered under Part A. By also filing under Part B, through use of Dr. Donald Peterson's signature, Concord Manor was in effect able to obtain separate remuneration for physical therapy, even though such costs were already included under the per diem rate.

[3] Dr. Peterson was appointed as medical advisor by petitioner. There was no meeting of the board of directors to confirm that appointment, nor could petitioner produce any minutes of the corporation which affirmed the existence of that appointment (Tr. 425).

[4] "Tr." designates the trial transcript, a copy of which is included in the appendix which was filed in the court of appeals and which is lodged with this Court. The transcript is separately paginated from the remainder of the appendix. The remainder of the appendix will be cited as "App."

fore the effective date of the 1968 amendments. During that period Zodiac furnished physical therapy to patients at Concord Manor. The therapy was administered by Helen Maeker, a registered physical therapist, and two therapy aides at the direction of petitioner and of individual patients' physicians (Tr. 233-238, 263-264, 276-277) Dr. Donald Peterson's involvement with Concord Manor was confined, by his own admission, to drafting procedures for submission to the Social Security Administration pursuant to the new amendment; at no time did he instruct Maeker or either of the physical therapy aides as to therapy for patients other than his own private patients, a number of whom were lodged at Concord Manor. No claims for these personal patients were included in the indictment. (Tr. 235-241, 263-266, 277-279, 395, 399, 481, 487, 505-508, 523, 525-527). Nevertheless, in 1969, Group Medical and Surgical Service received requests over Dr. Peterson's signature for payment of medical insurance benefits for Zodiac patients receiving physical therapy from January to June 1968. These requests were submitted on Form SSA-1490D (2), box 14 of which required that the administering doctor certify that he either supplied the services or had them provided under his personal direction (Tr. 56-60). The forms received contained Dr. Peterson's signature,[5] which had been forged by book-

[5] Exhibits 42, 47, 49, 53, 63, 74, 92, and 119, of the 120 claims filed through this procedure did not contain any signature in box 14 (See pages 165-E, 185-E, 193-E, 209-E, 249-E, 293-E, 359-E, 464-E in the two volumes of exhibits

keeper Lucille Morton at petitioner's direction (Tr. 59-60, 64, 295, 297, 302-303, 307).[6] The claims were subsequently paid to Dr. Peterson, who, after depositing them in his account, drew a new check for the same amount payable to the order of Zodiac.

Petitioner testified in his own behalf and presented character witnesses (Tr. 375-444). He denied telling Lucille Morton to sign Dr. Peterson's name to the claim forms (Tr. 404), and denied any intent to defraud (Tr. 418).

1. Petitioner contends that 18 U.S.C. 1001[7] is

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which are lodged with the Clerk of this Court; see also Tr. 93-95). As indicated by Bill West, Assistant Vice-President of the Government Programs Division of Group Hospital Service and Group Medical and Surgical Service (Blue Shield), the claims were paid through clerical error and should not have been paid without a doctor's signature (Tr. 46-47, 60, 94-95). None of these claims was among the thirty-nine for which petitioner was indicted (Tr. 26-30; App. 5A-11A). Petitioner's citation of Defendant's Exhibit 12 at 522-E (Count 3), 527-E (Count 11), 524-E (Count 22), 530-E (Count 28), and 537-E (Count 38) (Pet. 15), as showing that some of the claims in question were paid without Dr. Peterson's purported signature is without merit. Those forms were merely undated and unsigned copies filed by Lucille Morton with the bank deposit slip (See Tr. 206d, 313-315). The originals—which contain Dr. Peterson's forged signature—are found in the Government's Exhibit at 9-E (Count 3), 41-E (Count 11), 85-E (Count 22), 109-E (Count 28), and 149-E (Count 39).

[6] At no time did Mrs. Morton consult Dr. Donald Peterson concerning these billings (Tr. 296-297, 300).

[7] That section states as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States know-

unconstitutionally vague as applied to forms submitted for reimbursement for medical services under Medicare and therefore in violation of the Fifth and Fourteenth Amendments. We note initially that petitioner did not raise this issue below and therefore should not be allowed to raise it here. *Lawn* v. *United States*, 355 U.S. 339, 362 n.16. In any event, his argument has no merit. Form SSA-1490D(2) (see Pet. 10A) requires that box 14 contain the signature of a physician or supplier for the claim to be paid by the fiscal intermediary. In that box the following statement appears: "A physician's signature certifies that physician's services were *personally* rendered by him or under his *personal* direction" (emphasis added). The form itself thus makes clear that a general medical director such as Dr. Peterson was not authorized to sign the forms and recover for physical therapy that had actually been prescribed by other physicians and was not performed under his personal direction.[8] Indeed, petitioner

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ingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[8] Petitioner requested that Mr. West, the Blue Shield representative, give him the regulation relating to the definition of "personal direction" that was in effect in 1968 (Tr. 125). The court then stated "You may just send it up here and give it to Mr. Parrett [government counsel] if you find it" (Tr.

admitted that it was his understanding that prior to July 1, 1968, only a supervising physician could bill under Part B (Tr. 390-391, 405-407). Moreover, he specifically denied any knowledge of Dr. Peterson's precise duties in supervising the physical therapy administered by Zodiac at Concord Manor (Tr. 426). In these circumstances there was ample evidence from which the jury could conclude that petitioner had adequate notice that his actions—in effect double billing the fiscal intermediary—were in violation of 18 U.S.C. 1001. See generally, *United States* v. *Gilliland*, 312 U.S. 86, 91-93; *Postell* v. *United States*, 429 F. 2d 528, 529 (C.A. 6), certiorari denied, 401 U.S. 920.

2. Petitioner contends that the trial judge committed several reversible errors in her charge to the jury.

a. In her charge the trial judge stated (App. 127-A—128-A):

> The making of a false statement to an agency of the United States government is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statement charged in the indictment is a material statement.

125-126). At the close of all the evidence government counsel indicated that he had turned over to petitioner all that had been turned over to the government (Tr. 528). Petitioner did not object to this procedure, nor did he introduce any of the material he was given.

Petitioner contends that this instruction was incorrect since the materiality of the purported signature of Dr. Peterson in box 14 had not been established as a matter of law. But materiality was established by the testimony of the Blue Shield representative that without the signature the claims would not have been paid (Tr. 60). Unsigned claims were paid only through clerical error (Tr. 94-95). As explained in note 5, *supra*, each false claim with which petitioner was charged was signed. We note additionally that the charge in question was specifically approved in Devitt and Blackmar, *Federal Jury Practice and Instructions*, § 33.09 (1970); see also *Blake* v. *United States*, 323 F. 2d 245, 246-247 (C.A. 8).

b. Petitioner also contends that the trial judge erred in refusing to instruct on his theory of the case—that Dr. Peterson did not have to be physically present when the physical therapy services in question were rendered (Pet. 17-22; App. 105-A, 110-A, 117-A). Petitioner's requested instructions were quite properly refused since a proper foundation had not been laid. See generally, *Mann* v. *Anderson*, 447 F. 2d 533, 537-538 (C.A. 7). To the contrary, the evidence showed that the only "direction" exercised by Dr. Peterson was through use of his title of Medical Director (Tr. 374-66, 382, 475-480). He exercised no supervision, whether by physical presence or otherwise. At no time did he give Mrs. Maeker or either of the two physical therapy aides directions concerning patients other than his own private patients (Tr. 234-241, 263-266, 276-279, 480-481). Nor did

he give the bookkeeper, Mrs. Morton, instructions as to the billing of the fiscal intermediary (Tr. 296-297, 300). Furthermore, Dr. Peterson stated that he did not sign his name to the forms, and Mrs. Morton testified that she was specifically instructed by petitioner [9] to sign Dr. Peterson's signature to the claims. (Tr. 59-60, 64, 297, 300-303). In any event, the judge adequately instructed on the quantum of proof necessary to convict petitioner as follows (App. 135-A):

> The crimes charged in this case require proof of specific intent before the defendants can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act or acts. To establish specific intent the government must prove that each defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
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> Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and so be able to give direct evidence of

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[9] Petitioner's allegation that Mrs. Morton's testimony in the criminal trial differed from her deposition and testimony in the subsequent civil case is without merit. While in her deposition and testimony in the civil case, she did not say specifically that she had been instructed to sign Dr. Peterson's name, as she did at the criminal trial (Tr. 300-303), none of her subsequent testimony contradicted the fact that she acted at petitioner's instructions in completing the forms (see especially, Pet. App. C-5, C-10). When asked "[W]ho told you to put Donald Peterson's name on the form?" during the civil trial, Mrs. Morton replied "Mr. Peterson [petitioner] gave us the instructions on all of this form" (Pet. App. C-10).

what a defendant does or fails to do, of course there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does, or fails to do, may indicate intent, or lack of intent, to commit the offense charged.

Unless otherwise instructed, in determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence in the case which may aid determination of state of mind.

3. Petitioner lastly seems to contend that the evidence was insufficient to sustain his conviction. As shown by the review of the evidence, *supra*, pp. 3-6, when viewed in the light most favorable to the government, there was ample proof of petitioner's participation in the scheme to make false statements to and to defraud an agency of the United States. See *Glasser* v. *United States*, 315 U.S. 60, 80.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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